Rev.

# TRANSCRIPT OF RECORD.

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## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1888.**

No. ~~1401~~. 1058

H. W. ELLETT, PLAINTIFF IN ERROR,

*vs.*

THE STATE OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

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**FILED DECEMBER 26, 1888.**

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1888.

## No. 1461.

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H. W. ELLETT, PLAINTIFF IN ERROR,

*vs.*

THE STATE OF VIRGINIA.

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IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

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INDEX.

| | Original. | Print. |
|---|---|---|
| Caption | 1 | 1 |
| Petition for writ of error | 1 | 1 |
| Allowance of writ of error | 2 | 2 |
| Transcript from circuit court of city of Richmond | 2 | 2 |
| Notice of motion | 2 | 2 |
| Judgment | 3 | 2 |
| Bill of exceptions No. 1 | 3 | 3 |
| Plea | 3 | |
| Bill of exceptions No. 2 | 5 | 5 |
| Record of former judgment | 6 | 5 |
| Notice and return | 6 | 5 |
| Judgment | 6 | 6 |
| Pleas, &c. | 7 | 7 |
| Execution | 9 | 8 |
| Copies of coupons | 10 | 9 |
| Opinion | 10 | 10 |
| Clerk's certificate | 11 | 10 |
| Judgment | 12 | 11 |
| Opinion | 13 | 11 |
| Clerk's certificate | 16 | 12 |
| Petition for writ of error | 17 | 12 |
| Writ of error | 21 | 13 |
| Citation | 24 | 14 |
| Proof of service of citation | 25 | 15 |
| Bond | 26 | 15 |

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JUDD & DETWEILER, PRINTERS, WASHINGTON, DECEMBER 27, 1888.

c
a
c
v
s

T

g
c
a
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a
s
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2

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1 VIRGINIA:

Pleas before the supreme court of appeals held in the city of Richmond on Thursday, the 6th of December, 1888.

Be it remembered that heretofore, to wit, on the 30th of July, 1888, came H. W. Ellett, by counsel, and filed his petition praying for a writ of error and supersedeas to a judgment rendered by the circuit court of the city of Richmond on the 18th of May, 1888; which petition, with the transcript of the record accompanying the same, is as follows:

## *Petition.*

In the Supreme Court of Appeals of Virginia, Richmond.

ELLETT *vs.* COMMONWEALTH.

To the honorable judges of the supreme court of appeals of Virginia:

Your petitioner, H. W. Ellett, respectfully shows that he is aggrieved by a judgment pronounced against him by the circuit court of the city of Richmond on the 18th day of May, 1888, in a suit against him brought by the Commonwealth of Virginia. Your petitioner presents herewith a transcript of the record of said judgment, which shows the following case:

Your petitioner was sued in said court by said Commonwealth for taxes alleged to be due by him, and a judgment was recovered by said State against him, together with $16.40 for costs. Execution having been issued on said judgment, your petitioner tendered the sheriff in payment thereof overdue tax-receivable coupons of the State of Virginia for the costs, as well as for the other part of said judgment. The tender being refused, your petitioner was again sued in said court on said judgment, and in this suit he pleaded that he had tendered said coupons in payment of the execution on said judgment, but the court held that he could not pay said costs with coupons and rejected his plea, and gave a second judgment against him against defendant's claim that the laws of Virginia which forbid him to pay said costs with coupons are repugnant to section 10 of article 1 of the Constitution of the United States, which action of said court your petitioner assigns for error, and prays for a writ of error and reversal of said judgment.

PETITIONER,
*By Counsel.*

2 I, William L. Royall, counsel practicing in the supreme court of appeals, am of opinion that there is error in the judgment complained of, for which it should be reversed.

WM. L. ROYALL.

Writ of error awarded, with supersedeas. Bond required in the penalty of $100, conditioned as the law directs.

July 30, 1888.

B. W. LACY.

To the clerk of the court of appeals at Richmond, Va.

*Transcript of Record.*

VIRGINIA:

In the circuit court of the city of Richmond the following proceedings were had:

Be it remembered that at a circuit court of the city of Richmond, held at the court-room thereof, in said city, in building No. 1007 Main street, May 2, 1888, came S. B. Witt and Edm'd Pendleton, Esqs., attorneys, on behalf of the Commonwealth, and H. W. Ellett, by his attorney, and by consent of parties, by their attorneys, filed a notice, which, together with the return thereon, is in the words and figures following, to wit:

*Notice and Return.*

H. W. Ellett:

Take notice that on the 2d day of May, 1888, I will move in the circuit court of the city of Richmond for judgment against you for the sum of sixty-four dollars and forty-nine cents in favor of the Commonwealth of Virginia, the same being the amount due on an execution issued against you on a judgment in favor of said Commonwealth, rendered in the circuit court of the city of Richmond on the 20th day of March, 1888, pursuant to an act of the General Assembly, approved May 12th, 1887, entitled, &c.

S. B. WITT,
EDM'D PENDLETON,
*For the Commonwealth.*

I accept service of the above notice and consent that this cause may be docketed and heard at once.

May 2, 1888.

WM. L. ROYALL,
*For Defendant.*

3 And at another day, to wit, at a circuit court of the city of Richmond, held as aforesaid on Friday, the 18th day of May, 1888, this day came the parties, by their attorneys, and this cause having been docketed on the 2d day of May, by consent, a jury is now waived, and all the matters of law and fact arising in this case are submitted to the court; and the defendant having offered a special plea in writing of tender the Commonwealth, by her attorney, moved the court to reject the same, which motion the court sustained and rejected the same; and thereupon, the evidence being heard, it is considered by the court that the Commonwealth recover

against the defendant the sum of sixty-four dollars and forty-nine cents, with interest thereon from the second day of May, 1888, till paid, and the costs of this motion, including a fee of ten dollars to her attorney for this motion.

MEMO.—The defendant, by his attorney, this day excepted to sundry opinions of the court given against him upon the trial of this motion, and tendered two bills of exceptions, which were received by the court, signed, sealed, and ordered to be made a part of the record.

### *Defendant's First Bill of Exceptions.*

COMMONWEALTH OF VIRGINIA *vs.* H. W. ELLETT.

Be it remembered that on the trial of this cause the defendant offered to the court a special plea in writing of tender; which plea is in the following words and figures:

### *Plea.*

Circuit Court, City of Richmond.

H. W. ELLETT *ads.* THE COMMONWEALTH.

And the said defendant, by his attorney, comes and says that the said Commonwealth of Virginia ought not to recover the said sum of sixty-four dollars and forty-nine cents or any part thereof of him, because he says that heretofore, to wit, in the month of November, 1886, he was indebted to the said Commonwealth in the sum of $39.52 for taxes due to her by him.

That thereafter she brought an action against him for said sum in this honorable court, and on the 20th day of March, 1888, she recovered a judgment against him in this court for said sum of $39.52,
with interest, penalty, and costs on same, amounting on the
4 second day of May, 1888, to the sum of $24.49, all of which, together with said sum of $39.52 originally due by said defendant, amounting in the aggregate to the said sum of $64.49.

That on the 27th day of April, 1888, the said Commonwealth caused to be issued out of the clerk's office of this honorable court an execution and said judgment in the following words and figures, to wit, directed to the sheriff of the city of Richmond:

The Commonwealth of Virginia to the sheriff of the city of Richmond:

We command you that of the goods and chattels and real estate of H. W. Ellett in your bailiwick you cause to be made thirty-nine dollars and fifty-two cents, with interest thereon, to be computed after the rate of six per centum per annum from the 15th day of December, 1886, to the 20th day of March, 1888, until paid, and five per cent. penalty thereon, which the Commonwealth of Virginia late in our circuit court of the city of Richmond has *removed* as well for certain taxes for the year 1886 as interest thereon and the penalty also sixteen dollars and forty cents, which in the same court were adjudged for the costs of this cause, whereof the said H. W. Ellett is convict, as appears to us of record; and how you shall execute this writ, make known at the rules to be holden in the clerk's office of our said circuit court on the first Monday in June next.

And have then there this writ.

Witness Alfred Sheild, clerk of our said court at Richmond, this 27th day of April, 1888, and in the 112th year of the Commonwealth.

ALFRED SHEILD.

That on the second day of May, 1888, defendant tendered to said sheriff in payment of said execution two coupons for $30 each and one coupon for $3.00, and one dollar and forty-nine cents of lawful money of the United States; that each one of said coupons was cut from a bond issued by the State of Virginia under the provisions of her act of March 30th, 1871, entitled "An act to provide a plan of settlement of the public debt;" that each one of said coupons was overdue and past maturity, and each one bore upon its face the contract of said State of Virginia that it should be received in payment of all taxes, debts, and demands due to her; that the sum so tendered by defendant amounted to exactly what was due upon said execution for tax, interest, commissions, penalty, and costs; that said sheriff refused to receive said coupons and money in payment of said execution; that he refused to receive the same because the act of the General Assembly of said State, approved May 12th, 1888, entitled "Chapter 285. An act to recover by motion taxes and debts due the Commonwealth," &c., forbade him to receive them; that said sheriff has made the following returns to said execution, as said act requires, to wit:

5 "Coupons tendered as follows: Two thirty dollars and one three dollar coupon and one $\frac{49}{100}$ dollars in money; which tender is refused."

That he made said return because said act required it; that this second suit is brought because said act required it and said act is repugnant to section ten of article one of the Constitution of the United States; that said defendant has always been ready and willing since the moment of said tender aforesaid to deliver said coupons and money to said sheriff in payment of said execution, and he is still ready and willing to do so, and he brings the same into court here ready to deliver the same to said sheriff or to this honorable court in payment of said execution; wherefore he prays judgment of said Commonwealth of Virginia — ought further to maintain this motion against him.

WM. L. ROYALL,
*For Defendant.*

Which plea the Commonwealth, by her attorney, moved the court to reject upon the ground that the defendant had tendered the costs of the former motion in coupons alleged to have been issued by the State of Virginia, which the Commonwealth, by her attorney, claimed that the defendant had no right to do under the laws of the State of Virginia, and the court sustained said motion for reasons in writing filed in the papers and made a part of the record, against the defendant's claims that the statute or statutes of the State of Virginia which forbid him to pay the costs of the former motion against him in the State's overdue tax-receivable coupons is or are repugnant to section ten of article one of the Constitution of the United States, and the defendant excepted to the court's ruling and action in this behalf and tendered this his first bill of exceptions; which is signed, sealed, and enrolled.

B. R. WELLFORD, JR. [SEAL.]

### *Defendant's Second Bill of Exceptions.*

Circuit Court, City of Richmond.

COMMONWEALTH OF VIRGINIA
*vs.* } No. 562.
H. W. ELLETT.

Be it remembered that on the trial of this case the Commonwealth, to maintain the issue upon her part, introduced the record of the former judgment of the court against the defendant at the suit of said Commonwealth entered on the 20th day of March, 1888, which is as follows, to wit:

6 VIRGINIA:

In the circuit court of the city of Richmond the following proceedings were had:

Be it remembered that at a circuit court of the city of Richmond, held at the court-room thereof, in said city, in building No. 1007 Main street, March 20th, 1888, came S. B. Witt and Edmund Pendleton, Esqs., attorneys on behalf of the Commonwealth, and H. W. Ellett, by his attorney, and by consent of parties, by their attorneys, filed a notice; which, together with the return thereon, is in the words and figures following, to wit:

### *Notice and Return.*

In the Circuit Court, City of Richmond, Va.

To H W. Ellett:

Take notice that on the 6th day of February, 1888, in accordance with the statute in such cases made and provided, I shall move the judge of the circuit court of the city of Richmond for a judgment against you in favor of the Commonwealth of Virginia for the sum of $39.52, with interest thereon from the 15th day of December, 1886, till paid, that being the sum due by you to the said Commonwealth of Virginia for taxes, together with the penalty thereon, due on certain real property valued at $9,880 in the city of Richmond, the said taxes being the same assessed according to law by the Commonwealth of Virginia for the year 1886 upon the property aforesaid; also for damages and costs.

S. B. WITT,
EDM'D PENDLETON,
*For the Commonwealth of Virginia.*

*Return.*

Executed on Geo. S. Vashon & Sons, agents for H. W. Ellett, January 24th, 1888, by delivering to Geo. S. Vashon, Jr., a member of said firm, a copy of the within notice.

P. P. WINSTON, *D. S.*,
For LEWIS P. WINSTON, *S. C. R.*

And at another day, to wit, at a circuit court of the city of Richmond, held as aforesaid on the 20th day of March, 1888, the following order was entered:

THE COMMONWEALTH OF VIRGINIA *against* H. W. ELLETT, Def't.

Motion for $39.52 taxes for 1886.

This day came as well the Commonwealth's attorney and Edm'd
Pendleton, Esq., attorneys on behalf of the Commonwealth,
7 as the defendant, by his attorneys, and the defendant pleaded
"*nil debit*" and put himself upon the country, and the Commonwealth likewise; and the defendant filed a special plea of tender in writing, accompanied with the coupons and cash therein alleged to have been tendered, to which said plea the Commonwealth replied; and thereupon came a jury, to wit, Michael Burns, John Hume, P. S. Burford, Wm. E. Johnson, James C. Hannon, D. A. Brown, Jr., Rob't Smith, R. P. Oliver, John T. Wadsworth, Philip Bear, Geo. W. Jarvis, and Chas. F. Johnston, being selected by lot and sworn the truth to speak on the issues joined in this motion, and, having heard the evidence, upon their oaths returned a verdict in the words and figures following, to wit:

"We, the jury, on the issue joined, find for the Commonwealth the sum of thirty-nine dollars and $\frac{52}{100}$, with interest — 15th day of December, 1886, till paid, and the penalty of five per centum."

Whereupon the defendant, by his attorneys, moved the court to set aside said verdict and grant him a new trial; which motion the court, for reasons stated in writing and filed with the papers in the Commonwealth against A. O. Bell and Jas. H. King, overruled.

Therefore it is considered by the court that the Commonwealth recover against the defendant the amount, interest, and penalty ascertained by the jury in their verdict aforesaid, with interest on the aggregate amount thereof from this day till payment, and the costs of this proceeding.

MEMORANDUM.—The defendant, by his attorneys, this day excepted to sundry opinions of the court given against him upon the trial of this motion, and leave is given him to file his bill of exceptions at any time during the present term.

The plea of tender, in writing, referred to in the foregoing order is as follows:

### *Pleas.*

VIRGINIA:

H. W. ELLETT *ads.* THE COMMONWEALTH OF VIRGINIA.

### First plea.

And the said defendant, by his attorney, comes and says that he does not owe the said sum of $39.52 in the said notice specified in manner and form as the said Commonwealth of Virginia hath in said notice of said motion against him in said court set forth; and of this the said defendant puts himself upon the country.

### 8 Second plea.

And for a further plea in this behalf the said defendant says that before the date and service upon him of said notice of said motion, and before the commencement of this proceeding, to wit, on the — day of ——, in the year of our Lord 188–, the said defendant did pay to the said Commonwealth of Virginia the said sum of $—— in the aforesaid notice of said motion against him in said court set forth and specified.

And this the said defendant is ready to verify.

### Third plea.

And for a further plea in this behalf the said defendant says that prior to the notice of the motion herein made, to wit, on the — day of November, A. D. 1886, and when the taxes therein mentioned became due and payable, he was ready and willing and then tendered to the plaintiff in payment of said taxes coupons of bond No. 4590 for $30, of bond No. 391 for $7.50, of bond No. 252 for $1,50, and 52 cents in current money of the United Statse, aggregating the sum of $39.52; to receive which of the defendant the said plaintiff then wholly refused, and the defendant now brings into court the said sum of money and files with this his plea the said coupons tendered as aforesaid; which he is still ready to pay and turn over to the plaintiff.

And the said defendant avers that the said coupons were cut from bonds issued years ago by the State of Virginia, declaring upon their face, in conformity to the laws authorizing their issue, that they were receivable in payment of all taxes, debts, and demands due the Commonwealth.

And this he is ready to verify, &c.

SANDS-ROYALL, *P. Q.*

This ends the former record, with the exception of the execution which is inserted at the end of this record.

And thereupon the defendant, to maintain the issue on his part, offered to prove that he tendered to the sheriff of Richmond city in payment of the execution issued on said judgment coupons issued by the State of Virginia under her act of March 30th, 1871, which were overdue and bore the contract of said State that they should be received in payment of all taxes, debts, and demands due to said State; to the introduction of which evidence the Commonwealth, by her attorney, objected upon the ground that the defendant had no right to pay the costs adjudged against him on said former motion on said coupons; and the court sustained her objection for reasons, in writing, set — in defendant's first bill of exceptions against defendant's claim that the statute or statutes of Virginia which forbid 9 him to pay said costs are repugnant to section ten of article one of the Constitution of the United States; and the defendant excepted to the court's ruling and action in this behalf, and tendered this his second bill of exceptions; which is signed, sealed, and enrolled.

End of second record.

B. R. WELLFORD, Jr. [SEAL.]

*Execution.*

The following is a copy of the execution and return thereon:

The Commonwealth of Virginia to the sheriff of the City of Richmond, Greeting:

We command you that of the goods, chattels, and real estate of H. W. Ellett, in your bailiwick, you cause to be made thirty-nine dollars and fifty-two cents, with interest thereon, to be computed after the rate of six per centum per annum, from the 15th day of December, 1886, to the 20th day of March, 1888, and with interest on the aggregate amount from the 20th day of March, 1888, until paid, and five per cent. penalty thereon, which the Commonwealth of Virginia late in our circuit court of the city of Richmond has recovered, as well for certain taxes for the year 1886 as interest thereon and the penalty, also sixteen dollars and forty cents, which in the same court were adjudged for the costs of this cause, whereof the said H. W. Ellett is convict, as appears to us of record; and how you shall execute this writ make known at the rules to be holden in the clerk's office of our said circuit court on the first Monday in June next.

And have then there this writ.

Witness: Alfred Sheild, clerk of our said court, at Richmond, the 27th day of April, 1888, and in the 112th year of the Commonwealth.

ALFRED SHEILD.

*Statement of Debts and Return on Exucution.*

| | |
|---|---|
| Principal | $39 52 |
| Int. from 15th Dec., 1886, to March 20, 1888 | 3 08 |
| Int. to May 3, 1888, on above | 28 |
| | 42 88 |
| Penalty at 5 per cent | 2 15 |
| Costs | 16 40 |
| Commissions | 3 06 |
| | 64 49 |

Coupons tendered as follows: Two thirty-dollar and one 10 three-dollar coupons and one dollar and forty-nine cents in money; which tender is refused.

P. P. WINSTON, *D. S.*,
For LEWIS P. WINSTON, *S. C. R.*

*Coupons.*

The following are copies of the coupons referred to in the foregoing proceedings:

"*The Commonwealth of Virginia will pay the bearer thirty dollars interest, due 1st January, 1886, on bond No. 4590.
Coupon No. 29.

GEO. RYE,
*Treasurer of the Commonwealth of Virginia.*"

* Receivable at and after maturity for all taxes, debts, and demands due the State.

"*The Commonwealth of Virginia will pay to bearer, in Richmond or New York, seven $\frac{50}{100}$ dollars interest, due July 1st, 1886, on bond No. 391. No. 15 on back.
$7.50.

R. M. T. HUNTER,
*Treasurer of the Commonwealth of Virginia.*"

* Receivable at and after maturity for all taxes, debts, and demands due the State.

"*The Commonwealth of Virginia will pay to bearer, in Richmond or New York, one $\frac{50}{100}$ — interest, due January 1st, 1885, on bond No. 252. No. 12 on back.
$1.50.

R. M. T. HUNTER,
*Treasurer of the Commonwealth of Virginia.*"

* Receivable at and after maturity for all taxes, debts, and demands due the State.

The following is a copy of the opinion of the court referred to in the proceedings:

COMMONWEALTH *against* H. W. ELLETT.

MAY, 1888.

The plea of tender offered by the defendant can only be received upon the concession that the alleged tender was a proffered satisfaction of the entire amount due upon the execution.

11 If that entire amount had been for taxes, debts, and demands due the State of Virginia, the alleged proffer of tax-receivable coupons from her bonds would have been a sufficient tender, and there could be no objection to the entertainment of the plea. But if any portion of that amount in excess of the coupons alleged to have been tendered was not for taxes, debts, or demands due the State, the tender was insufficient, and the plea must be rejected.

The execution was for taxes, interest, and penalty thereon, due the State, and in addition thereto for the costs of the proceedings in which judgment for the taxes was obtained. These costs are for fees to the attorney for the Commonwealth and to the clerk and sheriff of the court for services rendered in the proceedings which culminated in the judgment for the Commonwealth. Now, can these costs be considered in any just sense as taxes, debts, or demands due the Commonwealth?

Section 13 of the act of May 12, 1887, Session Acts 187, page 260, prescribes that the fees of officers in these cases "shall be taxed in the costs against the defendant."

Section 16, chapter 181, Code '73, page 1163, speaking of cases "wherein there is a judgment or decree on behalf of the Commonwealth for costs," enacts that "what is so taxed for fees or allowances to any person shall be paid to him by the sheriff or officer who may recover said costs, unless," &c., &c.

Section 27, chapter 180, Code '73, page 1158, speaking as to fees of officers, witnesses, &c., in all cases where there is a judgment for costs, authorizes the officers to require the clerk to note upon the execution the exact amount due to them, and requires the sheriff to pay the amount, when collected, to them in despite of any assignment of the judgment or decree by the party in whose name the judgment has been recovered.

See also Thon *vs.* Commonwealth, 77 Va., 290, of opinion of court of appeals.

These provisions of the law seem to me conclusive that the costs in this case were not dues or demands of the Commonwealth, but were the private property of the officers who had earned the fees assessed in the costs.

It follows, therefore, that the tender of coupons was not a legal tender and the plea must be rejected.

Transcript of the record.

Fee, $6.60.

Teste: ALFRED SHEILD, *Clerk.*

A copy.
Teste: GEO. K. TAYLOR, *C. C.*

12 And now at this day, to wit, at a supreme court of appeals held at the State court-house, in the city of Richmond, on Thursday, the 6th of December, 1888, came again as well the plaintiff in error, by his counsel, as the attorney general on behalf of the Commonwealth, and the court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the said judgment. It is therefore considered that the same be affirmed, and that the Commonwealth recover against the plaintiff in error damages according to law, and also her costs by her about her defense herein expended, which is ordered to be certified to the said circuit court of the city of Richmond.

The following is a copy of the opinion of the court:

13 *Opinion.*

ELLETT *v.* COMMONWEALTH.

LACY, *J.:*

This is a writ of error to a judgment of the circuit court of the city of Richmond rendered on the 18th of May, 1888.

This was an action brought by the Commonwealth under the act of May 12th, 1887, entitled "An act to provide for the recovery by motion of taxes and certain debts due the Commonwealth, for the payment of which papers purporting to be genuine coupons of the Commonwealth have been tendered."

The plaintiff in error had already been sued under this
14 act, and judgment was recovered by the Commonwealth for
the taxes and for $16.40 for costs, and, execution having been issued thereon, the defendant Ellett tendered coupons in payment both for the judgment and the said costs, and the tender being refused the plaintiff in error was again sued under the said act, and in this suit he pleaded that he had tendered coupons both for the taxes due the Commonwealth and the costs due the officers of the court, but the court held that he could not pay the costs in coupons, rejected his plea, and gave a second judgment against him in spite
of his plea that the laws of the Commonwealth which for-
15 bade the payment of costs in coupons was repugnant to the
tenth section of article first of the Constitution of the United States.

In this action of the circuit court there was no error; there is no obligation upon the officers of the court to receive coupons in payment of their fees.

These fees were not for "taxes, debts, and demands due the Commonwealth," but were the property of the officers of the court, to which the State had and could have no valid claim, and there is no obligation upon these officers in any case to receive the coupons of the

State, genuine or spurious, in payment of their fees.

16 It follows that there is no error in the said judgment, and the same is affirmed.

A true transcript of the record.
Teste: GEO K. TAYLOR, *C. C.*

Fee for this transcript, $4.00.
Teste: GEO. K. TAYLOR, *C. C.*

STATE OF VIRGINIA,
*City of Richmond,* } *To wit:*

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the foregoing is a true transcript of the record and proceedings upon a writ of error lately pending in said court, in which H. W. Ellett was plaintiff in error and The Commonwealth of Virginia was defendant in error.

In testimony whereof I hereto set my hand and annex the seal of said court this 21st day of December, 1888.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

GEO. K. TAYLOR, *Cl'k.*

17 To the Honorable Justices of the Supreme Court of the United States:

Your petitioner, H. W. Ellett, respectfully represents that he owed the State of Virginia $39.52 as taxes for the year 1886; that he tendered her proper collecting officer in payment thereof thirty-nine dollars of coupons and fifty-two cents in lawful money of the United States, the two together constituting all of said State's claim; that each one of said coupons was overdue and past maturity and each one bore upon its face the contract of the State of Virginia that it should be received in payment of all taxes, debts, and demands due to said State, and each one was cut from a bond issued by the State of Virginia, pursuant to law, as and for her bond; that said tender was refused; that thereafter said collecting officer reported said tender and refusal to the attorney for the Commonwealth of Richmond city; that after said report to said Commonwealth attorney he instituted a suit, in the circuit court of the city of Richmond, against your petitioner, in the name of the State of Virginia, for said sum of $39.52, under the provisions of the act of May 12th, 1887; that the trial of said action resulted in a verdict and judgment for the said State for said sum, with large additions in the way of interest, penalties, and $16.40 of costs; that thereafter an execution was issued out of the clerk's office of said court on said judgment, in the name of said State as plaintiff, for said aggregate sum, amounting, when presented to your petitioner, to the sum of $64.49; that your petitioner tendered the sheriff in payment of said execution coupons such as have heretofore been described in this petition; that he tendered said coupons for said costs, as well as for the other part of said execution; that the sheriff refused to receive said 18

coupons in payment of said execution; that thereupon he
19 made returns on said execution that coupons had been tendered in payment of same; that the attorney for the Commonwealth immediately instituted another suit against your petitioner on said judgment, as he is required to do by said act; that your petitioner pleaded said tender of coupons as a defence to said second suit, but on demurrer to said plea the court held it bad for the reason that it held said costs could not be paid with said coupons, against defendant's claim that the laws of Virginia which forbade him to pay said costs with said coupons are repugnant to the Constitution of the United States; that your petitioner appealed from the judgment of said circuit court, but the supreme court of appeals of Virginia affirmed its judgment. Your petitioner assigns this action of said circuit court in holding that said costs could not be paid with said coupons, as affirmed by said court of appeals, as
20 error. Your petitioner therefore prays this honorable court to award him a writ of error and reverse said judgment of said supreme court of appeals.

PETITIONER,
By his att'y, WM. L. ROYALL.

[Endorsed:] Petition for writ of error. Ellett *v.* Com'th.

21 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of appeals of the State of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between H. W. Ellett, plaintiff in error, and The State of Virginia, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Con-
22 stitution or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings afore-

said, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the seventeenth day of December, in the year of our Lord one thousand eight hundred and eighty-eight.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

Allowed by—
JOHN M. HARLAN,
*Justice Sup. C't U. S.*

23 VIRGINIA:

In the clerk's office of the supreme court of appeals of Virginia, at Richmond, December 21st, 1888.

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that a copy of the within writ is on file in my office.

Given under my hand this 21st December, 1888.

GEO. K. TAYLOR, *Cl'k.*

24 The United States of America to the State of Virginia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of the State of Virginia, wherein H. W. Ellett is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this seventeenth day of December, in the year of our Lord one thousand eight hundred and eighty-eight.

JOHN M. HARLAN,
*Justice Sup. C't U. S.*

25 On this 21st day of December, in the year of our Lord one thousand eight hundred and eighty-eight, personally appeared Wm. L. Royall before me, the subscriber, a notary public for the city of Richmond, Virginia, and makes oath that he delivered a true copy of the within citation to Fitzhugh Lee, Governor of Virginia, and one to R. A. Ayers, attorney general thereof, on the 20th day of December, 1888.

WM. L. ROYALL.

Sworn to and subscribed the 21st day of December, 1888, in my said city.

A. B. GUIGON, *N. P.*

VIRGINIA:

In the clerk's office of the supreme court of appeals of Virginia, at Richmond, December 21st, 1888.

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that a copy of the within citation is on file in my office.

Given under my hand this 21st Dec., 1888.

GEO. K. TAYLOR, *Cl'k.*

26 Know all men by these presents that we, James P. Cooper and William L. Royall, are held and firmly bound unto the State of Virginia in the full and just sum of five hundred dollars, to be paid to the said State of Virginia, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twelfth day of December, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at a supreme court of appeals for the State of Virginia, in a suit depending in said court between H. W. Ellett, plaintiff in error, and The State of Virginia, defendant in error, a judgment was rendered against the said H. W. Ellett, and the said H. W. Ellett having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Virginia citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said H. W. Ellett shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

JAMES P. COOPER. [SEAL.]
WM. L. ROYALL. [SEAL.]
—— ——. [SEAL.]

Approved by—
JOHN M. HARLAN,
*Justice Sup. C't U. S.*

Dec. 17, '88.

27 VIRGINIA:

In the clerk's office of the supreme court of appeals of Virginia, at Richmond, December 21st, 1888.

I, Geo. K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the original bond, of which the foregoing is a copy, is on file in my office.
Given under my hand this 21st Dec., 1888.

GEO. K. TAYLOR, *Cl'k.*

Endorsed on cover: Virginia supreme court of appeals. No. 1461. H. W. Ellett, plaintiff in error, *vs.* The State of Virginia. Filed December 26, 1888.

Amm. Law Record

Jul. 1883.

Vol IV. no. 1. p. 21

# SUPREME COURT OF THE UNITED STATES.

The cases of *Cuthbert* vs. *Virginia*, No. 1142; *Hucless* vs. *Childrey*, No. 1216; and *ex parte Brown*, No. 1217; being cases involving parts of the same controversy over Virginia's coupons as is involved in the cases of *Vashon* vs. *Greenhow*, No. 23; *Bryan* vs. *Virginia*, No. 1055; *Cooper* vs. *Virginia*, No. 1056; *McGahey* vs. *Virginia*, No. 1057; *Ellett* vs. *Virginia*, No. 1058; which have heretofore been advanced by order of the court, it is stipulated and agreed that they may be advanced and heard along with the last-mentioned cases.

WM. L. ROYALL,
*for Plaintiffs in Error.*

R. A. AYERS,
*Attorney-General of Virginia,*
*for Defendants in Error.*

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I move the court to advance the above-named cases. The records are printed.

WM. L. ROYALL,
*for Plaintiffs in Error.*

Office Supreme Court U. S.
FILED,
OCT 16 1889
JAMES H. McKENNEY,
CLERK.

# Supreme Court of the United States.

October Term, 1889.

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|---|---|
| JAMES P. COOPER,<br>*Plaintiff in Error,*<br>vs.<br>THE STATE OF VIRGINIA, | No. 1056. |
| JOSEPH BRYAN,<br>*Plaintiff in Error,*<br>vs.<br>THE STATE OF VIRGINIA. | No. 1055. |

## BRIEF FOR PLAINTIFFS IN ERROR.

D. H. CHAMBERLAIN,
*Counsel for Plaintiffs in Error.*

# Supreme Court of the United States,

OCTOBER TERM, 1889.

| | |
|---|---|
| JAMES P. COOPER,<br>Plaintiff in Error,<br>*vs.*<br>THE STATE OF VIRGINIA. | No. 1056. |
| JOSEPH BRYAN,<br>Plaintiff in Error,<br>*vs.*<br>THE STATE OF VIRGINIA. | No. 1055. |

## In Error to the Supreme Court of Appeals of the State of Virginia.

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### I.

In the first of the above entitled cases, the plaintiff in error was proceeded against by the State under the Act of May 12, 1887, for taxes alleged to be due from him to the State.

The plaintiff in error filed a special plea of tender of tax-receivable coupons with an allegation that he had always been ready to deliver said coupons, and that he now brings the same into Court and tenders them. He also proved that he bought the coupons tendered in the open market in London, that he did not own the bonds from which they were cut, and did not know the owner, and had no means of knowing who owned them.

He was then called upon by the State to produce the bonds, and after replying that he could not produce them, he offered to prove that the State issued such bonds which were engraved and not signed manually.

To this evidence the State objected on the ground that *no foundation had been laid for secondary evidence*, and the Court sustained the objection against the defendant's claim that *the laws of Virginia which exclude this evidence are repugnant to the Constitution*; and defendant excepted.

*Record*, fol. 5.

Thereupon the defendant offered a witness who was asked in relation to his expert knowledge of the genuineness of coupons. To this question the State objected, and the Court sustained the objection, *on the same ground as above*, and against *the same claim of the defendant*.

*Record*, fols. 5, 6.

A verdict having been returned against the defendant, the defendant moved to set it aside, and for a new trial, which the Court denied for reasons set forth in an opinion.

*Record*, fol. 3; fols. 8, 9.

## II.

In the second of the above entitled cases, it does not appear that the production of the bond was demanded, but the same rulings were made upon the offer of the same testimony as in *Cooper* vs. *The State*.

The two cases present, therefore, the same substantial question, and differ from *McGahey* vs. *The State* only in the point now to be discussed.

## First.

It will be seen that the Court below did not, in express terms, uphold the validity of the Act of January 26, 1886, which requires the production of the bond in all suits under that act, or of the Act of January 21, 1886, which excludes expert testimony in proving the genuineness of coupons, but, in substance, held that the testimony offered was *secondary* evidence, for which no proper foundation had been laid.

On the face of the language here used, it might seem that this decision or ruling of the Court below did not raise a Federal question ; that is, that there was not drawn in question the validity of a statute of a State, or an authority exercised under any State, on the ground of their repugnance to the Constitution, and a decision given in favor of its validity; or that there was no right, title, privilege, &c., claimed under the Constitution and a decision given against such right, title, &c., since it is not decided in exact terms that the Act of January 26, 1886, is valid, or that the claim made under the Constitution, &c., is unfounded, but only in terms that no foundation was laid for *secondary* evidence. In view of this peculiarity of form at least in the record, it is necessary to see whether a Federal question is so presented as to give this Court jurisdiction in these two cases.

In the first place, it is to be observed that the jurisdiction of this Court is not limited to the question of "a statute of or an authority exercised under a State." By the terms of the same statute (R. S., § 709), if "any title, right, privilege, or immunity is claimed by either party, under the Constitution, and the decision is against such title," &c., the jurisdiction of this Court arises.

If, therefore, in these cases, a right, privilege, or immunity was claimed under the Constitution and the decision was against such right, &c., a Federal question is presented.

Here we may call to mind the object aimed at in laying down the conditions and limits of the jurisdiction of this Court over the decisions of State Courts. They are thus stated in *Murdock* vs. *Memphis*, 20 Wall., 590, at page 632.

"It was no doubt the purpose of Congress to secure to every litigant whose rights depended on any question of Federal law, that that question should be decided for him by the highest Federal tribunal if he desired it, when the decisions of the State Courts were against him on that question."

Prior to 1867, this Court was expressly limited to such errors as appeared "on the face of the record," but these words being omitted from the act of that year, this Court in *Murdock* vs. *Memphis*, p. 633, said,—"It is probable that in determining whether one of those (Federal) questions was actually raised and determined in the State Court, this Court has been inclined to restrict its inquiries too much by this express limitation of the inquiry to "the face of the record."

The Court thus states the rule properly applicable to the determination of this point (p. 628): "It if appears from the record that the plaintiff in error raised and presented to the Court by pleadings, prayer for instructions, or other appropriate methods, one of the questions specified in the statute, and the Court ruled against him, the jurisdiction of this Court attaches, and we must hear the case on its merits."

And the record is thus defined at page 634: "After all, the record of the case, its pleadings, bills of exceptions, judgment, evidence, in short, its record, whether it be a case in law or equity, must be the chief foundation of the inquiry."

Our position is that, notwithstanding the form in which the Court below put its ruling upon the offers of testimony made by the plaintiff in error, the records here present cases in which (1) was drawn in question the validity of a statute of a State, and the decision was in favor of its validity; and in which (2) a right and privilege was claimed by the plaintiff in error under the constitution and denied to him by the Court.

## I.

Was the validity of a State *statute* drawn in question and its validity sustained?

The State, on the trial, called for the production of the bonds, and the plaintiff, in error, failed to produce them. Thereupon the plaintiff, in error, offered evidence to show that the State had issued bonds with coupons corresponding with the coupons in suit.

The Court refused to admit the testimony, because no foundation was laid for *secondary* evidence.

This was, of course, a ruling, in effect, that the bond was the *primary* evidence, and any other evidence was *secondary*.

Now the Act of Virginia of January 26, 1886 (Code of 1887, § 412), gives the right to the party contesting the genuineness of coupons to call for the production of the bonds, and thereby makes the bonds the primary and indispensable evidence of the genuineness of the coupons.

*There is no other statute or law of Virginia which makes this requirement or establishes this rule of evidence.* The ruling made must, therefore, have been made *under that statute.*

And when the plaintiff, in error, as the record shows, "claimed that the laws of Virginia which exclude this evidence are repugnant to Section ten of Article one of the constitution" (fol. 5), the validity of a statute of Virginia—the Act of January 26, 1886—was drawn in question and the decision—the ruling excluding the evidence as secondary and offered before proper foundation laid—was a decision in favor of the validity of the Act in question.

That this ruling was made by the Court below with conscious reference to the Act of January 26, 1886, is shown by the opinion of the Court in the Record (fol. 9), where the Court says: "If these coupons were genuine, he ought to be able easily to *find the holder of the bond and produce it* here, or to give evidence of his diligence in the effort to do so. *He had full and timely warning of the necessity.*"

All this can have been said *only in reference to the provision of the Act of January 26, 1886*, which makes the production of the bond a condition of recovery.

The production of the bond as evidence of the genuineness of the coupons was required by no other law or act than the statute in question; and the only "warning" of such "necessity" was the existence of that statute.

If any other statute or law, decision or precedent, could be referred to on which such a ruling might have been based, there might be room for doubt whether the Court below was making this decision on the strength of the Act of January 26, 1886, or on some other foundation. But as we have said, there is no other possible foundation for the ruling. The ruling or decision was, therefore, in favor of the validity of this Act, and against the plaintiff in error's claim of its repugnance to the constitution.

This conclusion is fully and expressly confirmed by the language of the opinion of the Court of Appeals (Record of Cooper Case, fol. 13).

That Court says: "And also (it is claimed) that the Circuit Court maintained the validity of the Acts of January 21, 1886, amending and re-enacting Section 39 of Chapter 167 of the Va. Code, 1873, in relation to rules, pleadings and evidence, and *of January 26, 1886*, entitled "An Act to prescribe a rule of evidence in certain cases," but *there is no error in this ruling of the Circuit Court*, the same being in accordance with the ruling of this Court in the case *Commonwealth* vs. *Weller & Sons*, 82 Va., 721, and the case of *Cornwall* vs. *Commonwealth*, *id.*, 646.

Here the Court of Appeals treats the ruling of the Trial Court *as made distinctly upon the Acts of January 21 and 26, 1886.*

The same is *true as to the Act of January 26, 1886*, as appears by the record in the Bryan case.

Record of Bryan Case, fol. 11.

Here the Court of Appeals says:

"At the trial of the case the defendant was required to produce the bonds from which the coupons in question had been cut *in order to test their genuineness in the mode prescribed by law* by the Act of January 26, 1886, entitled "An Act to prescribe a rule of evidence in certain cases." *But the defendant insisted that this law was repugnant to the tenth section of Article first of the constitution of the United States and impaired the obligation of the contract of the State with him, and offered other secondary evidence, which the Court rejected*, and he excepted."

It is, therefore, beyond question that the Court of Appeals considered the Act of January 26, 1886, as directly involved in the ruling of the trial Court that the plaintiff in error had laid no foundation for secondary evidence.

## II.

But whether a statute of the State was drawn in question or not, a claim of constitutional right—a right, title, privilege, and immunity under the Constitution—was certainly made by plaintiff in error and denied by the Court.

The second bill of exceptions (*Record*, fol. 6) recites that the plaintiff in error offered a witness to whom a question was put respecting his qualification as an expert. The question was ruled out, the decision being put on the ground that no sufficient foundation had been laid for *secondary* evidence. The plaintiff in error claimed that the law of Virginia forbidding the asking of this question was repugnant to the fourteenth article of the Amendments to the Constitution.

If, therefore, repugnance to Section 10 of Article I depends upon the existence of a State *statute* violating the obligation of contracts, the fourteenth amendment forbids "any State from depriving any person of life, liberty or property, without due process of law."

This provision has been held to apply to the action of a State through any and all her agencies.

"Whoever" says the Court in *Ex parte Virginia*, 100 U. S.,—"by virtue of public position under a State Government, deprives another of property, life, or liberty (without due process of law) * * * violates the constitutional inhibition."

And in *Virginia* vs. *Rives* (100 U. S., 313), the Court says:

"It is doubtless true that a State may act through different agencies—either by its legislative, its executive, or its Judicial authorities; and the prohibitions of the amendment extend to all action of the State denying the equal protection of the laws, whether it be action by one of these agencies or another."

A State Court or Judge, therefore, who by any official action, by ruling or decision of any kind, deprives any person of property without due process of law, stands for the State, and violates the fourteenth amendment.

In the present case, the proceeding in question, by excluding all possibility of proving the genuineness of the coupons, and thereby causing a judgment to be obtained against the defendant, clearly deprived him of his property without due process of law.

Due process of law, at the least, requires that every man shall have his day in Court, with the right and opportunity to be heard and to maintain his rights by the ordinary methods. To give him a day in Court and there close his mouth, is not due process of law.

## Second.

The record shows that in each of these cases the plaintiff in error, after the rejection of the testimony first offered to show the genuineness of the coupons, next offered to prove the same by expert testimony, and that the testimony was rejected on the ground that no foundation had been laid for secondary evidence. (*Record*, fols. 5, 6.)

The only possible authority in the law of Virginia for rejecting expert testimony in this case upon the issue of genuineness, was the Act of January 21, 1886, now Code of 1887, § 412, which expressly forbids expert testimony to "establish the genuineness of *a coupon cut from a bond of the State*."

*Supra*, p.

This provision, it will be observed, applies to no other instruments than *coupons of State bonds*.

What has already been said upon the subject of excluding other testimony tending to show genuineness, after failure to produce the bond, applies to the exclusion of the testimony of expert witnesses. Although the trial Court saw fit to assign a reason for its exclusion other than the Act of January 21, 1886, if this Court can see that the real and only ground of exclusion was the statute in question, and if the plaintiff in error duly raised the question of the validity of such statute, this Court will regard that statute as drawn in question and the decision being in favor of its validity, the Court will find that a Federal question is presented.

The objection of the plaintiff in error was duly made, "that the law of Virginia which forbade him to ask said question was a law forbidding him to prove the genuineness of her coupons by the testimony of experts, and that it was repugnant," &c.

(*Record*, fol. 6).

The Court of Appeals specially concedes in its opinion that the Act of January 21, 1886, as well as the Act requiring the production of the bonds, were drawn in question in the case of *Cooper* vs. *The Commonwealth*, and specially passes upon the question by *affirming the validity of both these Acts.* "There is no error," that Court says, "in this ruling," to wit, the ruling that the Acts of January 21, 1886, and of January 26, 1886, were valid.

If this ruling was made, it presents beyond doubt a Federal question.

The *sixth* exception raises the further question of the repugnance of the act to the fourteenth amendment, as did the second exception (*Record*, fol. 8).

## Third.

Certain more general considerations than those already presented deserve attention.

If the fact that the trial Court made no direct mention of the acts of the State of which we complain, but in terms put its decision on a ground of general law, is sufficient to exclude the Federal question, then it is always possible for a State Court to prevent a State statute from reaching the consideration of this Court, and the purpose of Congress, which was stated in *Murdock* vs. *Memphis* to be, "to secure to every litigant whose rights depended on any question of Federal law, that that question should be decided for him by the highest Federal tribunal if he desired it, when the decisions of the State Courts were against him on that question," may be completely thwarted in any given case.

It may be admitted that if there is in the law of the State other than the statutes in question, a sufficient ground or authority for the decision made, no Federal question arises. But where, as here, no suggestion can be made of any warrant whatever for the decision in question except the statutes complained of, it is not possible that any Court can, by a mere verbal avoidance of mention of such statutes, avoid the question of the validity of such statutes. Courts are never in such slavery to forms or words. They will preserve the substance of the citizen's rights at the expense, if necessary, of the form.

Thus in *Murray* vs. *Charleston*, 96 U. S., 432, it was contended, on the part of the defendant in error, that inasmuch as the plaintiff in error did not in the trial Court put his right to recover upon the ground that the ordinances levying the tax which he sued to recover, and directing that it be retained from the interest due upon his stock, were in violation of the Constitution of the United States, and that he did not in terms invoke the protection of that instrument, no Federal question was presented by the record.

This Court, in reply, said " In questions relating to our jurisdiction, undue importance is often attributed to the enquiry whether the pleadings of the State Court expressly assert a right under the Federal Constitution. The true test is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question *was decided and decided adversely to the Federal right.* * * * Very little importance has been attached to the enquiry whether the Federal question was formally raised."

See also :

*Knox* vs. *Exchange Bank*, 12 Wall., 379.
*Chicago Life Ins. Co.* vs. *Needles*, 113 U. S., 574.

In conclusion, we present these principal grounds for holding that a Federal question is raised and presented by the record in each of these cases :

*First.*—Because there is not, either in the general law or judicial decisions or statutes of the State of Virginia, any ground upon which the rulings in question of the trial Court could have been founded, except the Acts of January 21 and 26, 1886, the one excluding expert testimony, and the other requiring the production of the bonds, and hence this Court must find that those acts were drawn in question and their validity sustained, against the plaintiff-in-error's claim that they were repugnant to the constitution.

*Second.*—Because, if it did not otherwise appear that these acts were drawn in question, the opinion of the Court of Appeals in each case shows that such was the fact, and the decision of that Court sustains in express terms the validity of both said acts.

The question of the validity of these acts, provided they are drawn in question in these cases, has already been discussed at length in our brief in *McGahey* vs. *Commonwealth*.

D. H. CHAMBERLAIN,
Counsel for Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
OCT 16 1889
JAMES H. McKENNEY,
CLERK.

# Supreme Court of the United States.

October Term, 1889.

JAMES P. COOPER,
*Plaintiff in Error,*
vs.
THE STATE OF VIRGINIA,
No. 1056.

JOSEPH BRYAN,
*Plaintiff in Error,*
vs.
THE STATE OF VIRGINIA.
No. 1055.

## BRIEF FOR PLAINTIFFS IN ERROR.

D. H. CHAMBERLAIN,
*Counsel for Plaintiffs in Error.*

# Supreme Court of the United States,

OCTOBER TERM, 1889.

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## In Error to the Supreme Court of Appeals of the State of Virginia.

---

## I.

In the first of the above entitled cases, the plaintiff in error was proceeded against by the State under the Act of May 12, 1887, for taxes alleged to be due from him to the State.

The plaintiff in error filed a special plea of tender of tax-receivable coupons with an allegation that he had always been ready to deliver said coupons, and that he now brings the same into Court and tenders them. He also proved that he bought the coupons tendered in the open market in London, that he did not own the bonds from which they were cut, and did not know the owner, and had no means of knowing who owned them.

He was then called upon by the State to produce the bonds, and after replying that he could not produce them, he offered to prove that the State issued such bonds which were engraved and not signed manually.

To this evidence the State objected on the ground that *no foundation had been laid for secondary evidence*, and the Court sustained the objection against the defendant's claim that *the laws of Virginia which exclude this evidence are repugnant to the Constitution;* and defendant excepted.

*Record*, fol. 5.

Thereupon the defendant offered a witness who was asked in relation to his expert knowledge of the genuineness of coupons. To this question the State objected, and the Court sustained the objection, *on the same ground as above*, and against *the same claim of the defendant.*

*Record*, fols. 5, 6.

A verdict having been returned against the defendant, the defendant moved to set it aside, and for a new trial, which the Court denied for reasons set forth in an opinion.

*Record*, fol. 3; fols. 8, 9.

## II.

In the second of the above entitled cases, it does not appear that the production of the bond was demanded, but the same rulings were made upon the offer of the same testimony as in *Cooper* vs. *The State*.

The two cases present, therefore, the same substantial question, and differ from *McGahey* vs. *The State* only in the point now to be discussed.

### First.

It will be seen that the Court below did not, in express terms, uphold the validity of the Act of January 26, 1886, which requires the production of the bond in all suits under that act, or of the Act of January 21, 1886, which excludes expert testimony in proving the genuineness of coupons, but, in substance, held that the testimony offered was *secondary* evidence, for which no proper foundation had been laid.

On the face of the language here used, it might seem that this decision or ruling of the Court below did not raise a Federal question; that is, that there was not drawn in question the validity of a statute of a State, or an authority exercised under any State, on the ground of their repugnance to the Constitution, and a decision given in favor of its validity; or that there was no right, title, privilege, &c., claimed under the Constitution and a decision given against such right, title, &c., since it is not decided in exact terms that the Act of January 26, 1886, is valid, or that the claim made under the Constitution, &c., is unfounded, but only in terms that no foundation was laid for *secondary* evidence. In view of this peculiarity of form at least in the record, it is necessary to see whether a Federal question is so presented as to give this Court jurisdiction in these two cases.

In the first place, it is to be observed that the jurisdiction of this Court is not limited to the question of "a statute of or an authority exercised under a State." By the terms of the same statute (R. S., § 709), if "any title, right, privilege, or immunity is claimed by either party, under the Constitution, and the decision is against such title," &c., the jurisdiction of this Court arises.

If, therefore, in these cases, a right, privilege, or immunity was claimed under the Constitution and the decision was against such right, &c., a Federal question is presented.

Here we may call to mind the object aimed at in laying down the conditions and limits of the jurisdiction of this Court over the decisions of State Courts. They are thus stated in *Murdock* vs. *Memphis*, 20 Wall., 590, at page 632.

"It was no doubt the purpose of Congress to secure to every litigant whose rights depended on any question of Federal law, that that question should be decided for him by the highest Federal tribunal if he desired it, when the decisions of the State Courts were against him on that question."

Prior to 1867, this Court was expressly limited to such errors as appeared "on the face of the record," but these words being omitted from the act of that year, this Court in *Murdock* vs. *Memphis*, p. 633, said,—"It is probable that in determining whether one of those (Federal) questions was actually raised and determined in the State Court, this Court has been inclined to restrict its inquiries too much by this express limitation of the inquiry to "the face of the record."

The Court thus states the rule properly applicable to the determination of this point (p. 628): "It if appears from the record that the plaintiff in error raised and presented to the Court by pleadings, prayer for instructions, or other appropriate methods, one of the questions specified in the statute, and the Court ruled against him, the jurisdiction of this Court attaches, and we must hear the case on its merits."

And the record is thus defined at page 634: "After all, the record of the case, its pleadings, bills of exceptions, judgment, evidence, in short, its record, whether it be a case in law or equity, must be the chief foundation of the inquiry."

Our position is that, notwithstanding the form in which the Court below put its ruling upon the offers of testimony made by the plaintiff in error, the records here present cases in which (1) was drawn in question the validity of a statute of a State, and the decision was in favor of its validity; and in which (2) a right and privilege was claimed by the plaintiff in error under the constitution and denied to him by the Court.

## I.

Was the validity of a State *statute* drawn in question and its validity sustained?

The State, on the trial, called for the production of the bonds, and the plaintiff, in error, failed to produce them. Thereupon the plaintiff, in error, offered evidence to show that the State had issued bonds with coupons corresponding with the coupons in suit.

The Court refused to admit the testimony, because no foundation was laid for *secondary* evidence.

This was, of course, a ruling, in effect, that the bond was the *primary* evidence, and any other evidence was *secondary*.

Now the Act of Virginia of January 26, 1886 (Code of 1887, § 412), gives the right to the party contesting the genuineness of coupons to call for the production of the bonds, and thereby makes the bonds the primary and indispensable evidence of the genuineness of the coupons.

*There is no other statute or law of Virginia which makes this requirement or establishes this rule of evidence.* The ruling made must, therefore, have been made *under that statute.*

And when the plaintiff, in error, as the record shows, "claimed that the laws of Virginia which exclude this evidence are repugnant to Section ten of Article one of the constitution" (fol. 5), the validity of a statute of Virginia—the Act of January 26, 1886—was drawn in question and the decision—the ruling excluding the evidence as secondary and offered before proper foundation laid—was a decision in favor of the validity of the Act in question.

That this ruling was made by the Court below with conscious reference to the Act of January 26, 1886, is shown by the opinion of the Court in the Record (fol. 9), where the Court says: "If these coupons were genuine, he ought to be able easily to *find the holder of the bond and produce it* here, or to give evidence of his diligence in the effort to do so. *He had full and timely warning of the necessity.*"

All this can have been said *only in reference to the provision of the Act of January 26, 1886*, which makes the production of the bond a condition of recovery.

The production of the bond as evidence of the genuineness of the coupons was required by no other law or act than the statute in question; and the only "warning" of such "necessity" was the existence of that statute.

If any other statute or law, decision or precedent, could be referred to on which such a ruling might have been based, there might be room for doubt whether the Court below was making this decision on the strength of the Act of January 26, 1886, or on some other foundation. But as we have said, there is no other possible foundation for the ruling. The ruling or decision was, therefore, in favor of the validity of this Act, and against the plaintiff in error's claim of its repugnance to the constitution.

This conclusion is fully and expressly confirmed by the language of the opinion of the Court of Appeals (Record of Cooper Case, fol. 13).

That Court says: "And also (it is claimed) that the Circuit Court maintained the validity of the Acts of January 21, 1886, amending and re-enacting Section 39 of Chapter 167 of the Va. Code, 1873, in relation to rules, pleadings and evidence, and *of January 26, 1886*, entitled "An Act to prescribe a rule of evidence in certain cases," but *there is no error in this ruling of the Circuit Court*, the same being in accordance with the ruling of this Court in the case *Commonwealth* vs. *Weller & Sons*, 82 Va., 721, and the case of *Cornwall* vs. *Commonwealth*, *id.*, 646.

Here the Court of Appeals treats the ruling of the Trial Court *as made distinctly upon the Acts of January 21 and 26, 1886*.

The same is *true as to the Act of January 26, 1886*, as appears by the record in the Bryan case.

Record of Bryan Case, fol. 11.

Here the Court of Appeals says :

> " At the trial of the case the defendant was required to produce the bonds from which the coupons in question had been cut *in order to test their genuineness in the mode prescribed by law* by the Act of January 26, 1886, entitled " An Act to prescribe a rule of evidence in certain cases " *But the defendant insisted that this law was repugnant to the tenth section of Article first of the constitution of the United States and impaired the obligation of the contract of the State with him, and offered other secondary evidence, which the Court rejected*, and he excepted."

It is, therefore, beyond question that the Court of Appeals considered the Act of January 26, 1886, as directly involved in the ruling of the trial Court that the plaintiff in error had laid no foundation for secondary evidence.

## II.

But whether a statute of the State was drawn in question or not, a claim of constitutional right—a right, title, privilege, and immunity under the Constitution—was certainly made by plaintiff in error and denied by the Court.

The second bill of exceptions (*Record*, fol. 6) recites that the plaintiff in error offered a witness to whom a question was put respecting his qualification as an expert. The question was ruled out, the decision being put on the ground that no sufficient foundation had been laid for *secondary* evidence. The plaintiff in error claimed that the law of Virginia forbidding the asking of this question was repugnant to the fourteenth article of the Amendments to the Constitution.

If, therefore, repugnance to Section 10 of Article I depends upon the existence of a State *statute* violating the obligation of contracts, the fourteenth amendment forbids "any State from depriving any person of life, liberty or property, without due process of law."

This provision has been held to apply to the action of a State through any and all her agencies.

"Whoever" says the Court in *Ex parte Virginia*, 100 U. S.,—"by virtue of public position under a State Government, deprives another of property, life, or liberty (without due process of law) * * * violates the constitutional inhibition."

And in *Virginia* vs. *Rives* (100 U. S., 313), the Court says:

"It is doubtless true that a State may act through different agencies—either by its legislative, its executive, or its Judicial authorities; and the prohibitions of the amendment extend to all action of the State denying the equal protection of the laws, whether it be action by one of these agencies or another."

A State Court or Judge, therefore, who by any official action, by ruling or decision of any kind, deprives any person of property without due process of law, stands for the State, and violates the fourteenth amendment.

In the present case, the proceeding in question, by excluding all possibility of proving the genuineness of the coupons, and thereby causing a judgment to be obtained against the defendant, clearly deprived him of his property without due process of law.

Due process of law, at the least, requires that every man shall have his day in Court, with the right and opportunity to be heard and to maintain his rights by the ordinary methods. To give him a day in Court and there close his mouth, is not due process of law.

## **Second.**

The record shows that in each of these cases the plaintiff in error, after the rejection of the testimony first offered to show the genuineness of the coupons, next offered to prove the same by expert testimony, and that the testimony was rejected on the ground that no foundation had been laid for secondary evidence. (*Record*, fols. 5, 6.)

The only possible authority in the law of Virginia for rejecting expert testimony in this case upon the issue of genuineness, was the Act of January 21, 1886, now Code of 1887, § 412, which expressly forbids expert testimony to "establish the genuineness of *a coupon cut from a bond of the State.*"

*Supra*, p.

This provision, it will be observed, applies to no other instruments than *coupons of State bonds.*

What has already been said upon the subject of excluding other testimony tending to show genuineness, after failure to produce the bond, applies to the exclusion of the testimony of expert witnesses. Although the trial Court saw fit to assign a reason for its exclusion other than the Act of January 21, 1886, if this Court can see that the real and only ground of exclusion was the statute in question, and if the plaintiff in error duly raised the question of the validity of such statute, this Court will regard that statute as drawn in question and the decision being in favor of its validity, the Court will find that a Federal question is presented.

The objection of the plaintiff in error was duly made, "that the law of Virginia which forbade him to ask said question was a law forbidding him to prove the genuineness of her coupons by the testimony of experts, and that it was repugnant," &c.

(*Record*, fol. 6).

The Court of Appeals specially concedes in its opinion that the Act of January 21, 1886, as well as the Act requiring the production of the bonds, were drawn in question in the case of *Cooper* vs. *The Commonwealth*, and specially passes upon the question by *affirming the validity of both these Acts.* "There is no error," that Court says, "in this ruling," to wit, the ruling that the Acts of January 21, 1886, and of January 26, 1886, were valid.

If this ruling was made, it presents beyond doubt a Federal question.

The *sixth* exception raises the further question of the repugnance of the act to the fourteenth amendment, as did the second exception (*Record*, fol. 8).

## Third.

Certain more general considerations than those already presented deserve attention.

If the fact that the trial Court made no direct mention of the acts of the State of which we complain, but in terms put its decision on a ground of general law, is sufficient to exclude the Federal question, then it is always possible for a State Court to prevent a State statute from reaching the consideration of this Court, and the purpose of Congress, which was stated in *Murdock* vs. *Memphis* to be, " to secure to every litigant whose rights depended on any question of Federal law, that that question should be decided for him by the highest Federal tribunal if he desired it, when the decisions of the State Courts were against him on that question," may be completely thwarted in any given case.

It may be admitted that if there is in the law of the State other than the statutes in question, a sufficient ground or authority for the decision made, no Federal question arises. But where, as here, no suggestion can be made of any warrant whatever for the decision in question except the statutes complained of, it is not possible that any Court can, by a mere verbal avoidance of mention of such statutes, avoid the question of the validity of such statutes. Courts are never in such slavery to forms or words. They will preserve the substance of the citizen's rights at the expense, if necessary, of the form.

Thus in *Murray* vs. *Charleston*, 96 U. S., 432, it was contended, on the part of the defendant in error, that inasmuch as the plaintiff in error did not in the trial Court put his right to recover upon the ground that the ordinances levying the tax which he sued to recover, and directing that it be retained from the interest due upon his stock, were in violation of the Constitution of the United States, and that he did not in terms invoke the protection of that instrument, no Federal question was presented by the record.

This Court, in reply, said " In questions relating to our jurisdiction, undue importance is often attributed to the enquiry whether the pleadings of the State Court expressly assert a right under the Federal Constitution. The true test is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question *was decided and decided adversely to the Federal right.* * * * Very little importance has been attached to the enquiry whether the Federal question was formally raised."

See also :

*Knox* vs. *Exchange Bank*, 12 Wall., 379.
*Chicago Life Ins. Co.* vs. *Needles*, 113 U. S., 574.

In conclusion, we present these principal grounds for holding that a Federal question is raised and presented by the record in each of these cases :

*First.*—Because there is not, either in the general law or judicial decisions or statutes of the State of Virginia, any ground upon which the rulings in question of the trial Court could have been founded, except the Acts of January 21 and 26, 1886, the one excluding expert testimony, and the other requiring the production of the bonds, and hence this Court must find that those acts were drawn in question and their validity sustained, against the plaintiff-in-error's claim that they were repugnant to the constitution.

*Second.*—Because, if it did not otherwise appear that these acts were drawn in question, the opinion of the Court of Appeals in each case shows that such was the fact, and the decision of that Court sustains in express terms the validity of both said acts.

The question of the validity of these acts, provided they are drawn in question in these cases, has already been discussed at length in our brief in *McGahey* vs. *Commonwealth*.

D. H. Chamberlain,
Counsel for Plaintiff in Error

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# Supreme Court of the United States.

JAMES P. COOPER
vs.
THE STATE OF VIRGINIA.
No. 1,056.

**Brief of William L. Royall for Plaintiff in Error.**

# Supreme Court of the United States.

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JAMES P. COOPER
vs.
THE STATE OF VIRGINIA. } No. 1,056.

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## Brief of William L. Royall for Plaintiff in Error.

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### STATEMENT OF THE CASE.

I venture to remark that this record presents to the court the most remarkable cause that was ever before it. It is remarkable for the extent to which a State judge, deciding for his State, can carry absurd rulings upon the common law.

The plaintiff in error owed the State of Virginia taxes. He tendered her her coupons in payment of them. They were refused, and he was sued for them in the Circuit Court of the city of Richmond, under the act of May 12, 1887. He pleaded his tender as a defence. That act provides that in such case the burden of proving a genuine and good tender shall rest on the person pleading it. The plaintiff in error proceeded to comply with the act. He proved that he bought his coupons in the open market in London, England; that he did not know who owned the bonds from which they came or where they were at the time, and that he knew of no clew by which he could ascertain where they were. The State called on him to produce the bonds from which they came, and he replied that he was unable to do so.

The plaintiff in error then offered to prove that the State did actually issue and put out bonds numbered serially as the coupons in issue were numbered, but the State objected to his being allowed to do so, and the court sustained her objections, upon the ground that no sufficient foundation had been laid for the introduction of secondary evidence.

The act of March 30, 1871, under which the bonds were issued, provides that they shall be numbered serially, and that the coupons shall be numbered from one to sixty-seven; and, in addition, that each coupon shall bear the serial number of the bond to which it belongs. All that the plaintiff in error sought to do, therefore, was to show that the State had actually issued bonds, with coupons attached, identical in every respect with those he held. How this could injure her, or how it could be considered secondary evidence, it is hard to perceive.

The act which directs the issue of these bonds and coupons provides that the coupons shall be payable to the bearer. We have thus the case of the holder of over-due coupons, payable to the bearer, which he has purchased in the open market, called on to prove them genuine, and at the same time forbidden by the party issuing them to prove that that party did actually issue instruments in all respects similar to those he held.

The plaintiff in error next offered to prove by an expert witness that the coupons in issue were the genuine coupons of the State of Virginia, but the court forbade him to do so, upon the ground that no sufficient foundation had been laid for secondary evidence. The act directing the issue of these bonds and coupons provides that the coupons shall be printed from an engraved plate, and not signed by any one, and the plaintiff in error proved that all that were issued were engraved simply, and not signed. The common law prevails in Virginia. Was it ever before heard that the common law forbade a party holding such instruments as these coupons, which he had purchased *bona fide* in the open market, from proving them genuine by the testimony of experts, when he had proved that he could not produce the bonds from which they came, and when the testimony of experts was the only evidence which it was possible to resort to? Nowhere is the principle that the testimony of experts may be used in such cases approved of more liberally than in Virginia. See *Common-*

*wealth* vs. *Moore*, 2 Leigh, 706; Bird's case, 21 Gratt., 800; Livingston's case, 14 Gratt., 592.

Moore's case, 2 Leigh, 701, was this: Moore was indicted for stealing four bank notes, amounting to thirty dollars. A witness (one Lauck) testified at his trial that a boy (Peter Lauck) had found some bank notes and silver in a pair of Moore's pantaloons, hid in the hay in witness' stable, and Moore had thereupon been arrested and carried before an examining magistrate, where the prisoner confessed before the magistrate that he had taken the money from the witness' storehouse. That when the witness was before the magistrate he was called upon to describe his bank notes; whereupon he said he remembered there were two ten-dollar notes and two five-dollar notes of the Farmers bank, but he could not describe them more particularly. Notes were then produced, answering that description, and delivered to the witness by the justice, upon which the witness testified that he could not swear to the identity of the notes, but he believed them to be his, and he also believed them to be genuine notes of the Farmers bank. Before the trial the witness passed the notes off, so that they could not be produced at the trial. The prisoner's counsel prayed the court to instruct the jury that as the bank notes were not produced at the trial, nor shown to have been lost or destroyed, and as it was not shown that the prisoner by any act of his had prevented the production of them, the jury could not convict the prisoner. This instruction the court refused to give; and exceptions were taken. The appellate court, passing on the exception, said:

"The second question is, in effect, whether, in every prosecution for the larceny of bank notes, it is necessary for the conviction of the prisoner that the notes should be produced at the trial? Conceding, for the sake of the argument, that in prosecutions of this kind the jury cannot convict unless they are satisfied that the stolen notes are genuine, we yet deny that the production of them is indispensable to prove that fact. Indeed, it seemed to be admitted by the prisoner's counsel that if they are lost or destroyed, or if the prisoner prevents the production of them, they need not be produced.

If the production of them be indispensable, it is not easy to perceive how the loss or destruction of them obviates the necessity. It is the province of the jury to judge of their genuineness by the evidence. If they are not produced, that circumstance weakens the proof, and may put at hazard the conviction of the accused; but though it may diminish the weight of the evidence, the non-production of the notes does not destroy the competency of the other evidence adduced to prove them to be of value. If they are produced, it has never been held necessary to prove *by the officers of the bank* that they are genuine. If such was the law, it would be impossible to carry on prosecutions for larceny of bank notes in various counties of the Commonwealth. Resort must be had to the evidence of persons accustomed in way of trade to receive and pay them away, and the non-production of them does not prevent such evidence being given. In this case Wm. Lauck had seen and owned them; he not only believed them to be genuine, but the act of receiving and paying them away, as things of value, proved that his belief was real. The other two witnesses had seen them; and the magistrate who delivered them to their owner as things of value had also an opportunity of ascertaining whether or not they were genuine. It was competent for the Commonwealth to introduce such evidence, which, though not so full, yet was of the same kind as that which might have been given if the notes had been before them."

It would be hard to find a more explicit declaration of the right to resort to opinion evidence than this case.

" And this upon the principle recognized in *Vander Donct* vs. *Thellum*, (8 Man. & Grau & Scott, 812,) in which it was held that all persons who practise a business or profession which requires them to possess a certain knowledge of the matters in hand are experts so far as expertness is concerned."—Bird's case, 21 Gratt., 808.

Thereupon the court instructed the jury as follows: " In the absence of any evidence to prove the genuineness of the coupons alleged to have been tendered by the defendant, the jury are instructed that they should find for the Commonwealth on the plea of tender."

Let it be borne in mind that this was a case of the State of Virginia against the defendant, and this was the State's own judge delivering the instruction. It was, therefore, the State trying her own cause. The instruction undoubtedly states the law correctly. It was the duty of the jury to find for the State in the absence of any evidence to prove the plea of tender. But did any one ever before hear of a party being commanded to sit dumb and then sentenced to death because he would not speak?

The defendant would not give up even after this. His coupons had been admitted as evidence, and he thereupon prayed the court to instruct the jury that they proved themselves; but it refused to do so. Thereupon the counsel for this pertinacious, and I might almost say contumacious, defendant attempted to argue to the jury that there was sufficient evidence before them to find the coupons genuine, notwithstanding the court's opinion on that point; but he was ordered to be silent, and thus this tragi-comedy came to an end—the end bring the triumph of the State over all law and justice, accomplished in the name of law and justice.

At every ruling against him the defendant claimed that the Constitution of the United States forbade the court to make the ruling, but the court made it nevertheless.

## ARGUMENT.

I suppose if the usual effect is to be given to the court's rulings, the plaintiff in error has no case for this court to review. On the face of the record the Circuit Court of Richmond city made no ruling on a Federal question, but made rulings upon questions of general commercial law, as contained in the great body of the common law.

There were statutes of the Virginia Legislature commanding the Circuit Court to make each ruling that it made. Why did it not base its decisions on those statutes? Was it because to have done so would have subjected those rulings to review in this court, whilst rulings upon the common law would not be subject to review here? Unless this was the court's purpose, it is difficult to find any reason whatever for the rulings that were made. It is absurd to say that the common law justifies them.

If a man is sued on his bond and he pleads *non est factum*, the common law welcomes the witness who can swear that he saw the defendant make and issue an instrument in all respects similar to that in question. If a man be sued on an instrument, and it be proved that primary evidence cannot be obtained to prove its genuineness, the common law welcomes the skilled witness who can come and testify from his skill and knowledge that the instrument in question is one made and issued by the defendant. Therefore, the question which confronts this court on the forefront of this case is, can it review it at all? And this question turns on the further question, will this court allow a State court to put a blind bridle on it, and conceal from it the fact that that State court has deprived a citizen of the United States of his Federal rights, under the pretence of enforcing and giving effect to the common law?

I understand the settled law of this court to be that it looks to the record to ascertain what Federal rights were claimed by the aggrieved party. And if it finds that Federal rights were claimed at the proper time and disallowed by the State court, it takes jurisdiction, without regard to the form in which the State court may send the record here. In the case of *Murdock* vs. *Memphis*, 20 Wall., the court says, at page 628:

> "It has many times been decided by this court, on motions to dismiss this class of cases for want of jurisdiction, that if it appears from the record that the plaintiff in error raised and presented to the court, by pleadings, prayer for instruction, or other appropriate method, one of the questions specified in the statute, and the court ruled against him, the jurisdiction of this court attached and we must hear the case on its merits."

Once before, when a State court sought to avail itself of its jurisdictional privileges and thereby destroy a litigant under pretence that it was merely enforcing State law, this court used these memorable words:

> "We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice."—*Gelpeke* vs. *Dubuque*, 1 Wall., pp. 206–7.

The same case is now before this court. If a State court may place its rulings upon pretended principles of the common law, which it is absurd to say exist, and ignore a litigant's claim that the Constitution protects him, then the functions of this court are ended. It comes at once within the province of the State courts to destroy Federal rights and certify to this tribunal that they were only enforcing the common law.

The defendant claimed that the Constitution protected him and that it forbade the court to make the rulings that it made, never mind on what ground those rulings were placed. This, I submit, condemned a principle of the common law as emphatically as it condemned a statute. I mean that if there is any principle of the common law which impairs the obligation of a contract, that it is obliterated and wiped out by the Constitution just as though it were a statute, for the reason that a Virginia statute has adopted the common law as the law of the State, and the common law has thereby become statute law.

Section 2 of the Code of 1887 reads as follows:

> "The common law of England, so far as it is not repugnant to the Bill of Rights and the Constitution of the State, shall continue in full force within the same and be the rule of decision, except in those cases wherein it shall be altered by the General Assembly."

This has been the law of Virginia since 1776.—Code of 1819, p. 135, ch. 38. The plaintiff in error proved that the coupons in issue were wholly printed from an engraved plate and bore no marks or handwriting which could be identified. He also proved that he did not own or control the bonds from which the coupons came, and did not know who owned or controlled them, and that he was wholly unable to produce them. To say that the common law does not make this a case for resorting to secondary evidence, even supposing the bond to be the primary evidence, (and I have shown in McGahey's brief that it might be no evidence at all,) is to say that the person affirming the proposition is wholly ignorant of the principles of the common law. If he cannot produce the bond, then he cannot prove his case without resorting to other evidence, and the common law denies no man the opportunity to prove his case by the best evidence attainable. There is, therefore, no principle of the common law which inhibited the defendant from proving his case; but if there were it would be a statute of Virginia and condemned by the Constitution of the United States.

The court's reasons for excluding the defendant's evidence are to be found at the end of the record, at page 7. The opinion was delivered in the case of *State* vs. *A. O. Bell*, who was the first one of five hundred victims led *to the altar and sacrificed.* The process being patented, was applied to all the five hundred, and therefore the court certifies that it excluded the defendant's evidence for the reasons set out therein. (Bill of Exceptions No. 6.)

The judge's discussion of the subject leaves it a little hazy, but I gather his idea to be that the bond from which the coupon came must be produced, that it may be seen that the State did actually issue it. He means that the engraving company which manufactured the bonds might have delivered them in a complete form to the State, and that some rascally officer might, after that, have obtained possession of them and have issued them for his own benefit instead of for the State. This was held, notwithstanding the fact that the defendant was eager and anxious to prove that such was not the fact. He insisted on his right to prove that the State did actually issue and put out the very bonds from which his coupons came, but the court refused to allow him to do so. And the defendant's second bill of exceptions and the record of McGahey's case prove to a demonstration that no such bonds have ever been in existence. Such bonds as these are what are meant by the term "spurious" in the lying act of Assembly considered in *Antoni* vs. *Greenhow*, 107 U. S. (See Mr. Justice Field's opinion.) I take issue *in limine* with the State court.

If the State's officers proved false to their trust, and fraudulently issued bonds for their own benefit, nevertheless the State is bound to the *bona fide* holders for value, without notice, of the coupons from such bonds, they being negotiable instruments put upon the market by the acts of her agents. The case of *Cooke et. al.* vs. *United States*, 91 U. S. R., 389, proceeds upon the theory that a government is bound upon negotiable paper which gets upon the market through the negligence or fraud of its officers, when in the hands of a *bona fide* purchaser for value, without notice of any defect in the title to the instrument.

At page 398 the court says:

> "Laches is not imputable to the Government, in its character as sovereign, by those subject to its dominion.—*United States* vs. *Kilpatrick*, 9 Wheat., 735; *Gibbons* vs. *United States*, 8 Wall., 269. Still, a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there. Thus, if it becomes the holder of a bill of exchange, it must use the same diligence to charge the drawers and endorsers that is required of individuals; and if it fails in this, its claim upon the parties is lost.—*United States* vs. *Barker*, 12 Wheat., 559. Generally, in respect to all the commercial business of the Government, if an officer specially charged with the performance of any duty, and authorized to represent the Government in that behalf, neglects that duty and loss ensues, the Government must bear the consequences of his neglect."

And again, at page 401, the court says:

> "The notes in question are not made payable at any particular place; consequently they are payable in law at the treasury, and this is at the seat of government and in the Treasury Department. In this department the Secretary represents the Government. His acts and his omissions, within the line of his official duties, are the acts or omissions of the Government itself; and in all commercial transactions his official negligence will be deemed to be the negligence of the Government."

Again, at page 403, the court says:

> "It was, however, contended by Cooke & Co. that if the notes were not counterfeit, but genuine notes unlawfully and surreptitiously put in circulation, the Government was bound for their payment to a *bona fide* holder, and consequently that there could be no recovery. We quite agree with the lamented judge of the Circuit Court, who had this case before him upon error to the Dis-

trict Court, that the evidence tending to show a fraudulent or surreptitious issue of notes printed from the genuine plates was exceedingly meagre, and by no means sufficient to warrant a verdict to that effect; but the jury was not permitted to pass upon that question, as the district judge charged 'that if the notes were printed in the department, and all ready for issue, yet if they were not in fact issued, the United States could not recover. The issue to bind the Government,' said the judge, 'must be a physical act of an authorized officer.'

"It was conceded on behalf of the Government, in the argument here, that if the notes had been due when they were received and paid, this part of the charge could not be sustained. We need not, therefore, examine that question."

It is too clear for argument, on the general principle of the common law and on the authority of the foregoing case, that if the officers or agents of the State of Virginia negligently or fraudulently issued bonds of the State with negotiable coupons attached, which came to the hands of *bona fide* purchasers for value without notice, the State is bound to redeem such in the hands of those parties.

It is too plain for argument that by declining to place his rulings upon the ground that the Virginia statutes which required the bonds to be produced and forbade the introduction of expert testimony are constitutional, and by placing them upon alleged principles of the common law, the judge supposed that his decision was placed beyond the power of review by this court. But has he succeeded in doing this?

There is no principle of the common law which exempts the State from liability on bonds improperly issued by her agents, but if there were, that rule of the common law would be as much a statute of Virginia, as has been already shown, as any other statute.

But, apart from that, to refuse to allow the plaintiff in error to prove his coupons genuine because he could not perform the impossibility of producing the bonds from which they came would be depriving him of his property without due process of law, and repugnant to the fourteenth article of amendment to the Constitution, and the plaintiff in error claimed the protection of this amendment, as will be seen by reference to his second and sixth bills of exceptions.

In the case of *Ex parte Virginia*, 100 U. S. R., this court said, at page 347:

> "We have said the prohibitions of the fourteenth amendment are addressed to the States. They are: 'No *State* shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, . . . . nor deny to any person within its jurisdiction the equal protection of the laws.' They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents of the State, or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty (without due process of law), or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or evade it."

This is a clear and distinct affirmation of the proposition that if a State judge, acting for and in the name of the State, deprives any one of his property without due process of law, the act is the act of the State and forbidden by the fourteenth amendment. In these cases the judge who tried them deprived the plaintiffs in error of their property without any process of law whatever. In other words, he used the power with which the State had clothed him to extort their property from them for the benefit of the State.

To the same effect as the above case is that of *Pennoyer* vs. *Neff*, 95 U. S. R., 733.

I consider the attempt made by the circuit judge to place his ruling upon propositions that cannot be reviewed in this court the most important matter that has been developed in this whole controversy. If the State courts can exclude the jurisdiction of this court by refusing to pass upon the Federal rights asserted by parties, and by placing their rulings upon alleged principles of the common law which have no real existence, then the guarantees of the Constitution are of no sort of practical value. "We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice."—*Gelpcke* vs. *Dubuque*, 1 Wall., 206–7. The case of *Murray* vs. *Charleston*, 96 U. S. R., 432, seems conclusive of the matter. See especially what is said at page 441.

I pray the court to pass definitely upon each one of the errors assigned in all the cases submitted. For it to omit passing on any one is only to sow the fruitful seeds of further litigation. To pass distinctly upon each one assigned will, I believe, end this controversy. Indeed, the proposition laid down in *United States* vs. *Reese*, 92 U. S., 214, seems to be that in a case of this kind the court is bound to pass upon all the errors assigned. It is true Reese's case was one of a certificate of division between the circuit and district judge. But the Chief Justice says, page 222: "If we reverse, all questions certified, which may be considered in the final determination of the case, according to the opinion we express, should be answered." There can be no difference in principle between answering questions that may arise in a further trial and passing on erroneous rulings that are liable to be made in a further trial. See also 6th, 7th, and 8th paragraphs of the syllabus of *Dred Scott* vs. *Sandford*, 19 How., 393, which is exactly in point for what I ask. I submit this as the brief in Bryan's case.

WM. L. ROYALL,
*for Pl'ff in Error.*

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JAMES H. McKENNEY,
CLERK.

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# Supreme Court of the United States.

JOHN McGAHEY
vs.
THE STATE OF VIRGINIA.
No. 1,057.

## BRIEF FOR PLAINTIFF IN ERROR.

61654

# Supreme Court of the United States.

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## BRIEF FOR PLAINTIFF IN ERROR.

### Statement of the Case.

The plaintiff in error was sued in the Circuit Court of Alexandria city by the State of Virginia for $12.60 taxes, due her under the provisions of the act of May 12, 1887, printed at the end of this brief in Appendix A, at page 62.

When the case was called for trial, he moved the court to quash the notice of motion and dismiss the suit, on the ground that the act under which it was brought was repugnant to the Constitution of the United States; but his motion was overruled and he excepted. At the trial he pleaded that he had tendered to the proper collecting officer, before suit was brought, the State's over-due tax-receivable coupons, issued under authority of the funding act of March 30, 1871, which were printed wholly from an engraved plate and not signed manually by any one, as said act authorized them to be.

The said act, after elaborating the scheme for funding the old bonds into the new ones authorized by it, provides (section 4):

> "The Treasurer is hereby authorized and directed to forthwith cause to be prepared, engraved or lithographed, registered bonds and bonds with coupons and certificates of the character mentioned in the second and third sections of this act; and when prepared shall commence the issuance of the same as herein provided. The bonds and certificates shall be signed by the Treasurer and countersigned by the Second Auditor; the coupons shall be signed by the

Treasurer, or a fac-simile of his signature shall be stamped or engraved thereon."—Acts 1870–'71, p. 379.

Issue was joined upon the plea. Plaintiff in error then proved that he did not own the bonds from which his coupons were cut, and that he did not know anything whatever in respect to their ownership; that when he purchased the coupons they were already detached from the bonds; that they were payable to the bearer, and that he purchased them in the open market as and for the genuine coupons of the State, in good faith and without any reason to doubt their genuineness.

He then offered to prove by an expert witness that the coupons in issue were genuine coupons, but the court refused to receive such testimony or allow to it to go to the jury, because of the act of the General Assembly of Virginia, approved January 21, 1886, entitled "An act to amend and re-enact section 39 of chapter 167, Code of 1873, in relation to rules, pleadings and evidences," now incorporated into and constituting part of section 412, Code of 1887, and printed at the end of this brief; to which ruling the defendant then and there excepted, on the ground that said act was repugnant to section 10 of Article 1 of the Constitution of the United States. And in this connection the court is asked to read the communication of H. H. Dyson, Second Auditor, to the President of the Senate and the Speaker of the House, at page 8 of the record.

At this point the defendant rested his case, and the State demanded of the defendant the production of the bonds from which his coupons were cut, with proof that said coupons were cut therefrom, as provided for by said section 412 of the Code of 1887. The defendant moved the court to overrule and disallow said claim, on the ground that said section is repugnant to section 10 of Article 1 of the Constitution of the United States. But the court ruled that said section was valid and sustained said demand, to which ruling the defendant (who was unable to comply with said demand) then and there excepted.

The defendant thereupon prayed the court to instruct the jury as follows:

> "The court instructs the jury that the production of the bonds from which the coupons in issue were cut, together with proof that the coupons were cut therefrom, is not necessary to establish the genuineness of the coupon; and the act of the General Assembly of Virginia, approved January 26, 1886, entitled 'An act to prescribe a rule of evidence in certain cases,' (now part of section 412, Code of 1887,) requiring such production and proof when demanded, is in conflict with and repugnant to section 10 of Article 1 of the Constitution of the United States, and to Article 14 of the amendments thereto, and is void."

But the court refused this instruction, and instructed the jury that the said act, now section 412 of the Code of 1887, was valid, and that such production of bond and proof, when demanded, was necessary to establish the genuineness of the coupons; to both of which rulings of the court defendant then and there excepted.

The defendant further prayed the court to instruct the jury as follows:

> "If the jury believe from the evidence that the State of Virginia issued her bonds with tax-receivable interest coupons thereto attached, which coupons were made payable to bearer, and were printed from an engraved plate and not signed manually by any officer of the State; and if they believe, further, that the defendant purchased the coupons filed with his plea of tender in the open market, in good faith as and for genuine coupons of said State, then they are instructed that the act of her General Assembly, approved May 12, 1887, entitled 'An act to provide for the recovery by motion of taxes and certain debts due the Commonwealth,' &c., which attempts to place upon the defendant the burden of proving them genuine, is repugnant to section 10 of Article 1 of the Constitution of the United States, and is void."

But the court refused to give this instruction, and the defendant excepted.

The trial resulted in a verdict and judgment for the State.

Defendant sued out a writ of error from the Supreme Court of Appeals of this State, assigning all his exceptions as error, but said Supreme Court affirmed the judgment of the lower court, holding that no error had been committed.

Plaintiff in error makes the following assignments of error here:

First. The action of the Circuit Court, as affirmed by the Supreme Court of Appeals, in refusing to quash the notice of motion and dismiss the suit.

Second. The refusal of the Circuit Court, as affirmed by said Supreme Court, to allow the coupons to be proved genuine by the testimony of an expert witness.

Third. The action of the Circuit Court, as affirmed by said Supreme Court, in sustaining the State's demand for the production of the bonds from which said coupons were cut.

Fourth. The action of the Circuit Court, as affirmed by said Supreme Court, in refusing to instruct the jury that section 412, Code 1887, is repugnant to the Constitution of the United States.

Fifth. The action of the Circuit Court, affirmed by said Supreme Court, instructing the jury that said section was valid and that it was incumbent upon plaintiff in error to produce said bonds.

Sixth. The action of the Circuit Court, affirmed by said Supreme Court, refusing to instruct the jury, as prayed, that the burden of proving the coupons spurious was upon the State, and that it was not incumbent on the defendant to prove them genuine at the outset.

## ARGUMENT.

The alleged errors will be discussed in the order in which they are assigned; and therefore, first, Is the act of May 12, 1887, under which the action was brought, repugnant to the Constitution of the United States?

Let it be observed that the solitary point decided in *Ex parte Ayers* (123 U. S. R., 443,) is that the suit of *Cooper et al.* vs. *Marye et al.*, in which it was sought to enjoin Ayers from bringing a suit under said act of May 12, 1887, was a suit against the State of Virginia and barred by the Eleventh amendment. The case does not decide that the act of May 12, 1887, is consistent with the Constitution of the United States. Indeed, it would appear from what was said by Mr. Justice Harlan, in his dissenting opinion, that in the conferences of the justices the unconstitutionality of the act was a concessum in the case. At page 515 he says:

> "The Commonwealth of Virginia has no more authority to enact statutes impairing the obligations of her own contracts than statutes impairing the obligations of contracts exclusively against individuals. * * * * * A statute which is void as impairing the obligation of the State's contract affords no justification to any one and confers no authority. If an officer proposes to enforce such a statute against a party, the obligation of whose contract is sought to be impaired, the latter, in my judgment, may proceed by suit against such officer, and thereby obtain protection in his right of contract, as against the proposed action of that officer.
>
> "A contrary view enables the State to use her immunity from suit to effect what the Constitution of the United States forbids her from doing—namely, to enact statutes impairing the obligations of her contracts. If an officer of the State can take shelter behind such immunity, while he proceeds with the execution of a void enactment, to the injury of the citizen's rights of contract, it would look as if that provision which declares that the Constitution of the United States shall be the supreme law of the land, anything in the Constitution or laws of a State to the contrary notwithstanding, had lost most, if not all, of its value in respect to contracts which a State makes with individuals."

It is difficult to perceive what place this language has in the discussion, unless, as the learned justice knew, it was a concessum in the case that the act was repugnant to the Constitution.

And it would be a strange process of reasoning that could make the act consistent with the contract entered into by the State when she issued her coupons. Observe: The act does not order that suit shall be brought when spurious coupons have been tendered, or when coupons are tendered, the genuineness of which the officer has reason to doubt; but a preceding act, that of January 26, 1882, forbids the collectors to receive any coupons, whether genuine or not, and the act of May 12, 1887, requires the officer to institute suits in all cases where coupons have been tendered, whether the coupons tendered were genuine or not. It surely cannot be consistent with the State's contract that she would receive the coupons "when offered" (*Antoni* vs. *Greenhow*, 107 U. S. R., 776; *Poindexter* vs. *Greenhow*, 114 U. S. R., 278,) for her to say now that she will not receive them "when offered," but will only receive them after the holder has been postponed an indefinite time and subjected to the inconvenience and expense of a lawsuit.

How many persons would have relinquished to her one-third of their claims upon her and taken her new bonds if they had been warned in advance that the State reserved to herself the right to pass this act? It is impossible to believe that any bonds would have been funded.

Nor is there any sort of inconsistency in this view. It is perfectly consistent for the court to have said in Ayers' case that the suit of *Cooper* vs. *Marye* was a suit against the State of Virginia, and one, therefore, of which the Circuit Court could not take jurisdiction at all; but to say now, the act of May 12, 1887, being directly called in question before it, that act is repugnant to the Constitution of the United States. Whatever was said in Ayers' case that would seem to be consideration of the validity of the act was wholly obiter.

There can be no question that it was the intention of this act to destroy the coupons. Appendix A to this brief makes that too plain for argument, and this court has held (*Poindexter* vs. *Greenhow*, 114 U. S. R., at page 304, *et seq.*,) that all the acts having this purpose in view must fall together. See the opinion quoted in Appendix A at page 65.

The record in McGahey's case shows plainly that the suit was brought because the act of Assembly of May, 1887, required it to be brought. The notice of the motion (p. 2) states that proceedings are commenced "in accordance with the statutes in such case made and provided," and this is the only statute pertaining to the subject. The motion to quash (p. 3) is in the following language:

> "Now comes the defendant, by his counsel, and moves the court to quash notice of this motion and to dismiss all proceedings under it, upon the ground that the act of Assembly approved May 12, 1887, under which notice is given, is repugnant to section 10 of Article 1 of the Constitution of the United States; which motion the court overruled."

The first bill of exceptions (p. 4) states the same thing. This bill is a certificate by the court that the motion was brought under the act of May, 1887.

Finally, the Supreme Court of Appeals, in reviewing the action of the Circuit Court, distinctly held that the suit had been brought under the act of May, 1887, and that that act was not unconstitutional. The opinion is set out at page 10 of the record. In it the following occurs:

> "The proceeding was by motion, and the defendant moved to quash the notice of said motion and dismiss all proceedings under it, upon the ground that the act of Assembly approved May 12, 1887, under which the motion is instituted and the notice given, is repugnant, &c.; which motion the court overruled, and this ruling is assigned as error. * * * * * * There was, therefore, no error in this ruling of the Circuit Court."

It may be argued, however, that even though the act of May, 1887, is void, still the judgment stands good as a judgment which the Commonwealth's attorney was otherwise authorized to procure in virtue of the general functions of his office. But I insist that the attorney for the Commonwealth is wholly without power to institute an action in the name of the State, unless that power is conferred upon him by the act of May, 1887. If we look to the Constitution and statute law of Virginia to see what are the powers and functions of the attorney for the Commonwealth, we find that the Constitution of the State, adopted in July, 1869, nearly two years before the funding act was passed, provides, Article 6, section 16, that there shall be elected—

> "One Commonwealth's Attorney, who shall be the Commonwealth's Attorney for the Circuit Court, and shall hold his office for a term of two years."

The Legislature, proceeding to make this provision effectual, provided by the act of July 11, 1870 (Acts 1869-'70, p. 257):

> "The duties, compensation, and liabilities of sheriffs, attorneys for the Commonwealth, and clerks of the County and Circuit Courts, shall be the same as are now or may be hereafter prescribed by law."

We have to look back to the Code of 1860 to determine what the duties "prescribed by law" were, as no legislation took place in the meanwhile.

The Code of 1860 provides (ch. 165, secs. 6, 7, and 8, p. 701,) as follows:

> "Sec. 6. There shall be elected by the voters in each county an attorney for the Commonwealth for each County Court, and in each county in which a Circuit Court is held, an attorney for the Commonwealth for such court."

The rest of the section relates to the manner of election.

> "Sec. 7. Such attorney, in any County or Corporation Court, shall be allowed by the court such sum," &c.

The rest of the section relates to their compensation.

> "Sec. 8. Every commissioner of the revenue, sheriff, constable, or other officer, shall give information of the violation of any penal law to such attorney, who shall forthwith institute and prosecute all necessary and proper proceedings in such case, whether in the name of the Commonwealth or of a county or corporation, or of the overseers of the poor; and may in such case issue or cause to be issued a summons for any witness he may deem material to give evidence before the grand jury."

This is the entire general provision of law defining the duties of attorneys for the Commonwealth, and this looks to his prosecution of violations of the penal laws only. There are a number of other special provisions to be found in the Code of 1860, but all provide for prosecutions under the penal laws. I have searched that Code in vain for any provision authorizing the attorney for the Commonwealth to bring actions in the name of the State for her taxes. There was no necessity for any such provision, as the law provided that the collector should have the power of peremptory seizure and sale of goods without a judgment.—Code, 1860, p. 212, secs. 5, 6, 7, 8. That chapter and the next provide for the sale of real estate, where taxes are not paid, as delinquent property; and various other sections provide for prosecuting all persons who fail to pay license-taxes, and punishing them.

It is very clear, therefore, that the attorney for the Commonwealth had no power to bring these actions except as he was authorized and directed to do so by the act of May, 1887, and as that act is repugnant to the Constitution of the United States, the action should have been dismissed.

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NOTE.—Whilst this brief was being printed, the highest Court of Virginia
ts cannot be maintained. See Appendix C.

x in the Virginia Law
ber 10th 1889, page 695.

But suppose it could be shown that the statutes in existence when the coupons were issued authorized the Commonwealth's attorney to bring actions in the name of the State whenever he pleased; yet that act, if it authorized him to bring an action against a tax-payer who had tendered her genuine coupons, would be inconsistent with the coupon contract and would thereby be made void. This was held in *Royall* vs. *Virginia* (116 U. S. R., 572). In that case Royall was prosecuted under a statute passed before the coupons were issued, but the court held that as the statute was inconsistent with the coupon contract it was void, although the coupon was issued after the statute was in existence.

I hope and trust that the court will not only declare the judgments entered under the act of May 12, 1887, voidable, but void, and thus end the indefinite amount of litigation that will issue from the two thousand or more judgments that have been entered under it.

In Royall's case (117 U. S. R.) the court said (p. 248):

> "But with respect to the other proposition, it is very clear that, if the local statute under which Royall was indicted be repugnant to the Constitution, the prosecution against him has nothing upon which to rest, and the entire proceeding against him is a nullity, as was said in *Ex parte Siebold* (100 U. S., 371–376): 'An unconstitutional law is void and is no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but it is illegal and void and cannot be a legal cause of imprisonment.'"

To same effect is *Norton* vs. *Shelby* (118 U. S., at p. 442).

### SECOND ASSIGNMENT OF ERROR.

The next assignment is the refusal of the Circuit Court to allow proof of genuineness of the coupons by the testimony of experts.

The coupons are printed from an engraved plate and have no handwriting upon them. The testimony of experts is therefore the very best evidence that could possibly be produced. The bonds from which the coupons came are signed by the Treasurer and Second Auditor, whose handwriting can be proved, and they bear the seal of the State. But it might very well be that the production of the bond would in no wise tend to prove that the coupons are genuine. The coupons run across the foot of the bond in rows of five, numbered from two to sixty-seven, and there are thirteen successive rows all printed on one sheet of paper with a narrow line between each row. The cutting of the coupons begins with the first one at the bottom of the right-hand corner. The one next to the left of this is cut, and so on to the left until that row is cut off. The cutting next begins at the right-hand coupon on the row above the bottom one. Now suppose all that row has been cut off, and the coupons from these two rows are held by persons knowing nothing of each other and the first coupon cut—that is, the one that was at the right of the bottom row was the one in issue. All the others that stood between it and the bond would be gone, and how could it tend to show that that coupon was once attached to the bond for the bond to be produced? There could be positively nothing in common between them, and no aid could possibly be derived from the production of the bond. The bond, therefore, is not the best evidence, and the testimony of experts is the best evidence.

But this is all by the way. The substantial matter is this: The coupons are payable to the bearer, and are intended to be severable from the bond and sold by the owner of the bond to other persons, this bond-owner being in one country and the coupon-owner in another, with no connecting links between them, as was the fact in the case under consideration, the plaintiff in error having shown that he bought his coupons in the open market and knew nothing of the bond or the owner.

Now, when the coupon was issued, it must, *ex vi termini*, have been intended that if the coupon, when severed from the bond, was called in question, the coupon-holder should be permitted to prove its genuineness by any competent evidence that was available. If this was the contract, then the act which forbids him to prove it by the testimony of experts must be one impairing the obligation of his contract.

The common law of England was many years ago adopted as the law of Virginia. Section 2 of the Code of 1887 reads as follows:

> "The common law of England, so far as it is not repugnant to the principles of the Bill of Rights and Constitution of this State, thall continue in full force within the same, and be the rule of decision, except in those respects wherein it is or shall be altered by the General Assembly."

This has been the law of Virginia ever since 1776. (1 R. C., 1819, p. 135, ch. 38.)

It cannot be necessary to cite authorities to prove that the common law allowed the testimony of experts to be introduced to prove a fact when that was the appropriate or best evidence. And the common law in respect to this matter has been acknowledged by the Virginia courts to prevail in that State in its fullest force. See *Commonwealth* vs. *Moore*, 2 Leigh, 706; Bird's case, 21 Gratt., 800; Livingston case, 14 Gratt., 592.

Moore's case, 2 Leigh, 701, was this:

Moore was indicted for stealing four bank notes, amounting to thirty dollars. A witness, one Lanck, testified at his trial that a boy (Peter Lanck) had found some bank notes and silver in a pair of Moore's pantaloons hid in the hay in witness' stable, and Moore had thereupon been arrested and carried before an examining magistrate, when the prisoner confessed before the magistrate that he had taken the money from the witness' storehouse. That when the witness was before the magistrate he was called upon to describe his bank notes; whereupon he said he remembered there were two ten-dollar notes and two five-dollar notes of the Farmers bank, but he could not describe them more particularly. Notes were then produced answering that description and delivered to the witness by the justice, upon which the witness testified that he could not swear to the identity of the notes, but he believed them to be his, and he also believed them to be genuine notes of the Farmers bank. Before the trial the witness passed the notes off, so that they could not be produced at the trial. The prisoner's counsel prayed the court to instruct the jury that as the bank notes were not produced at the trial, nor shown to have been lost or destroyed, and as it was not shown that the prisoner by any act of his had prevented the production of them, the jury could not convict the prisoner. This instruction was refused and exceptions taken. The appellate court, passing on the exception, said:

> "The second question is, in effect, whether, in every prosecution for the larceny of bank notes, it is necessary for the conviction of the prisoner that the notes should be produced on the trial? Conceding, for the sake of the argument, that in prosecutions of this kind the jury cannot convict unless they are satisfied that the stolen notes are genuine, we yet deny that the production of them is indispensable to prove that fact. Indeed, it seemed to be admitted by the prisoner's counsel that if they are lost or destroyed, or if the prisoner prevents the production of them, they need not be produced. If the production of them be indispensable, it is not easy to perceive how the loss or destruction of them obviates the necessity. It is the province of the jury to judge of their genuineness by the evidence. If they are not produced, that circumstance weakens the proof and may put at hazard the conviction of the accused; but though it may diminish the weight of the evidence, the non-production of the notes does not destroy the competency of the other evidence adduced to prove them to be of value. If they are produced, it has never been held necessary to prove by *the officers of the bank* that they are genuine. If such was the law, it would be impossible to carry on prosecutions for larceny of bank notes in the various counties of the Commonwealth. Resort must be had to the evidence of persons accustomed, in the way of trade, to receive and pay them away, and the non-production of them does not prevent such evidence being given. In this case the witness, Wm. Lanck, had seen and owned them; he not only believed them to be genuine, but the act of receiving and paying them away, as things of value, proved that his belief was real. The other two witnesses had seen them; and the magistrate who delivered them to their owner as things of value had also an opportunity of ascertaining whether or not they were genuine. It was competent for the Commonwealth to introduce such evidence, which though not so full, yet was of the same kind as that which might have been given if the notes had been before them."

It is hard to find a more explicit declaration of the right to resort to the testimony of experts than this.

> "And this upon the principle recognized in *Vonder Donckt* vs. *Thelluson* (8 Man. Gran., Scott, 812), in which it was held that all persons who practise a business or profession which requires them to possess a certain knowledge of the matters in hand are experts, so far as expertness is concerned."—Bird's case, 21 Gratt., 808.

It being the law of the land when these coupons were issued that they might be proved when called in question by the evidence of experts, this law entered into and became part of the coupon contract. For the State now to say that they shall not be proved by the testimony of experts is for her to enact a statute impairing the obligation of her contract.

### THIRD ASSIGNMENT OF ERROR.

The next assignment is the court sustaining plaintiff's demand that defendant produce the bonds from which his coupons were cut, and instructing the jury that such production and proof that the coupons were cut from those bonds was necessary to establish their genuineness. In other words, the court's action in sustaining the validity of section 412, Code 1887, against defendant's claim that it was repugnant to the Constitution of the United States.

That section reads as follows:

> "When any paper purporting to be a coupon cut from a bond of the State is offered in evidence in any case, the burden of showing its genuineness shall be on the party offering it. If the paper be printed, engraved, or lithographed, expert testimony shall not be received to establish such genuineness. At the hearing, or on the trial of the issue, the party contesting the genuineness of such coupon may call for the production of the bond from which the coupon was detached, and the plaintiff shall be required to produce the bond as a condition precedent to his right of recovery."

Issuing these bonds and coupons in the form in which they were put out was the act of the State. It was in no sense the act of those who held them. She chose to put them out in a form which authorized the bondholder to sever his coupons from the bond and which authorized the Virginia taxpayer to purchase the coupon after it had passed through an indefinite number of hands, and when all traces or connection between himself and the bondholder were lost. She therefore, *ex vi termini*, contracted that if the coupon was called in question the holder of it should not be required to produce the bond from which it came, but might prove it by any other appropriate evidence that was available. It is, therefore, a direct and positive repudiation of her contract for her now to demand the production of the bond as a condition precedent to the coupon-holder proving his coupon to be genuine.

To say that the coupon-holder, after purchasing the coupon upon the State's invitation, may be dragged by her into litigation with her in her own courts, and there be required by her to sit dumb while she sentences him, because he does not perform the impossibility of producing a bond that she agreed he should not be compelled to produce, is to say that she may sue him without cause and then forbid him to make any defence. This it is beyond the power of the State to do. In his work on Constitutional Limitations (4 ed., p. 368, Marge, 458, top,) Mr. Cooley says:

> "But there are fixed bounds to the power of the Legislature over this subject, which cannot be exceeded. As to what shall be evidence, and which party assume the burden of proof in civil cases, its authority is practically unrestricted so long as its regulations are impartial and uniform, but it has no power to establish rules which, under pretence of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights."

Of course the case of *Beers* vs. *Arkansas* (20 How., 527,) will be cited in opposition to these views, but manifestly that case and this are the very opposite of each other. In *Beers* vs. *Arkansas* Beers was suing the State of Arkansas, and he was of course compelled to sue her on such terms as she chose to grant. But in this case the State is suing the coupon-holder, and seeking to prevent his making any defence to her suit. This is not the administration of justice; it is robbery, under the form of judicial procedure.

The distinction between the two proceedings cannot be stated more clearly and distinctly than it was stated by Mr. Justice Bradley, speaking for himself and three other Justices of this court, including the Chief Justice, in his dissenting opinion in *Poindexter* vs. *Greenhow* (114 U. S., at page 335–6), where he says:

> "But, then, it will be asked, has the citizen no redress against the unconstitutional acts or laws of the State? Certainly he has. There is no difficulty on the subject. Whenever his life, liberty, or property is threatened, assailed, invaded by unconstitutional laws, he may defend himself in every proper way by *habeas corpus*, by defence to prosecutions, by actions brought on his own behalf, by injunction, by *mandamus*. Any one of these modes of

redress, suitable to his case, is open to him. A citizen cannot in any way be harassed, injured, or destroyed by unconstitutional laws without having some legal means of resistance or redress. But this is where the State or its officers are moving against him. The right to all these means of protection and redress against unconstitutional oppression and exaction is a different thing from the right to coerce the State into a fulfilment of its contracts. The one is an indefeasible right—a right which cannot be taken away; the other is never a right, but may or may not be conceded by the State; and if conceded, may be conceded on such terms as the State chooses to impose."

### FOURTH ASSIGNMENT OF ERROR.

The next error assigned is the refusal of the court to instruct the jury that the State's contract made the coupon *prima facie* evidence of its own genuineness, so as to place on her the burden of proving it spurious, and that the act of May 12, 1887, in attempting to shift this burden to the shoulders of the coupon-holder, so as to make him prove it genuine, impairs the obligation of the contract. I ask the court to consider the argument on this assignment as an argument on the fourth assignment in the case of *Cooper* vs. *The State of Virginia*.

It is undoubtedly true that under the laws of the land an individual may challenge any written obligation that he has made, and thus force the holder to prove affirmatively that the instrument in question was actually executed by him.

But the right of an individual to do this, even perversely and arbitrarily is one thing; the right of the State to pass an act branding all her coupons as spurious, and thus forcing the holders to prove them genuine, in the first place, is quite another thing. The difference is between the perverse act of an individual and the right of a State to enact a statute inconsistent with her contract. The question, then, is, Did the State reserve the right to enact a statute whenever she pleased, branding all her coupons as spurious, and placing on the coupon-holder the burden of proving affirmatively, in the first instance, that each coupon, although admitted to be genuine, was genuine? No denial is made of the right of any officer of the State to challenge any coupon, the genuineness of which he doubts, and thus put the coupon-holder on proof of its genuineness, just as the perverse individual may force the holder of his obligation to prove it genuine. But if the State's contract was that every coupon she put out should be *prima facie* genuine, an act of her Legislature making them all *prima facie* spurious must be inconsistent with that contract. The only question, therefore, is, Was it the intention of the parties when the contract was entered into that the coupons should be *prima facie* evidence of their own genuineness?

Now, to arrive at what was intended we must look to the terms of the contract, the circumstances under which it was issued, and to its nature.

Let it be observed that the coupon is payable at any time in the future to the bearer, and is receivable at any time in the future from the bearer for taxes. It is wholly printed from an engraved plate and bears the handwriting of no individual, so that it is not susceptible of proof at all, except proof of a secondary character.

Now, is it credible that an individual, a corporate body or a State, putting out vast quantities of such instruments as these, could have intended to fix in them the quality that a person proffering one should bring with it proof that the one proffered, purporting on its face to be the contract of the party sought to be bound, had really been issued by that party? The instrument is intended to float about through the money markets of the world, to be bought in good faith by innocent purchasers, who never had a suspicion that the State ever claimed that any counterfeit or spurious ones were in existence. Is it credible that the parties to the contract, when they entered into it, intended that such a purchaser should load himself with an obligation to carry along with the instrument, wherever he went, affirmative proof that Virginia had really issued the one which he held, when such proof could not possibly be procured? Such a supposition is absolutely inconsistent with the terms and nature of the contract. It would be attaching to the contract a condition that would destroy the essential nature of the contract. This court said, in *Murray* vs. *Charleston* (96 U. S., at page 445):

> "A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity."

And so we may say here, that a promise to receive this coupon from the bearer, with a secret reserved right to require the bearer to bring with it proof that it had been issued, is an absurdity. It must be that the contract was, that all coupons on their face complying with the terms of the law providing for their issue, and purporting to be of that issue, should go as one of that issue, and each one so purporting should stand as the State's coupon until her officer put his finger upon some particular one and proved that she had not really issued it.

Let us consider, now, the circumstances surrounding the parties to the contract when it was made.

The State of Virginia had just come out of a devastating and desolating civil war. Her resources were enormously depleted and her population greatly impoverished. She had paid no interest for ten years, and was anxious to get her creditors to release her from one-third of her debt. The consideration that she offered to the creditor to induce him to give her the release was the tax-receivable coupons, which she represented to him he could make available, if she did not pay them, by selling them to her tax-payers as offsets to her claims against them. The bondholder was necessarily distrustful of the State at best. Now suppose she had said to him, as part of her proposition, that though she gave him the coupon receivable for taxes, yet she reserved the right, whenever he attempted to sell it to her tax-payers, to pass an act requiring that tax-payer to bring along with it affirmative proof that she had issued it—how many bondholders would have funded? It is incredible that any would have done so. The bondholder would have replied: "I live in England or Russia. As the coupons have no handwriting on them, the only proof of which they are susceptible is either the bond itself, while they are part of it, or the testimony of experts. I live many thousand miles away from Virginia, and it will never do, both on account of expense and risk, for me to have to send my bond over to Virginia every time I sell a coupon; and if the tax-payer must hunt up an expert witness every time he wants to use a coupon he will say the expense and trouble of the thing are too great for the profit, since the great bulk of the taxes are collected in small sums from each individual tax-payer." The reservation of a right to pass such an act is utterly inconsistent with the nature of the contract, and if no such act can be passed, the coupon goes, as a matter of course, as genuine until it is challenged by some one. The court will observe that the pleas assert the genuineness of the coupons, and there is no denial of their genuineness. For reasons that are stated further on it is insisted that when the plea makes this averment it can be contradicted only by a denial, under the oath of the party making the denial. That, as the law in existence in Virginia when the coupon was put out required such denials to be made under oath, that law entered into the contract and became part of it, as is shown later on.

The *prima facie* character of genuineness is the most important element of all such contracts as these coupons, since the mercantile transactions of the whole world are now based on engraved paper. The Bank of England notes are engraved only, and not signed. This is in the very essence and nature of all such contracts. They are all supposed in the first instance to be genuine, and the supposition continues until their genuineness is denied. The State undoubtedly issued and put out vast numbers of these coupons, which are intended to float about through the money markets of the world as negotiable instruments. She must therefore be intended to have agreed that every instrument having the characteristics and marks of those issued by her, and being in every respect identical with those issued by her, should be presumed, in the hands of a *bona fide* holder for value without notice, to have been issued by her until she made proof that it was not really issued by her. Otherwise, what is the credit of those which she actually issued worth? In his work on "Lombard Street," p. 69, (New York: Scribner, Armstrong & Co., 1877,) discussing the nature of credit, Mr. Walter Bagehot says: "Every banker knows that if he has to prove that he is worthy of credit, however good may be his arguments, in fact his credit is gone."

Let it be distinctly understood that no question is being raised as to the right of any of her officers to challenge any of her coupons that he has reason to doubt the genuineness of, and thus put the holder on proof of its genuineness. The point made is that it is inconsistent with the coupon contract for the State to enact a statute branding all alike, genuine and spurious, as spurious, and thus forcing the holder, in the first place, to start out by proving those admittedly genuine to be genuine. This is a statute manifestly inconsistent with the contract. The officer may, in his discretion, undoubtedly force the holder of any coupon which he believes to be spurious to prove it to be genuine. But in that case he takes on himself the risk of all the consequences that follow his wrongful refusal of the coupon if it turns out to be genuine, just as a bank takes on itself all the risks of refusing to pay a depositor's check because its cashier is of opinion that the check is not really in the handwriting of the depositor. The United States treasury notes are all taken from an engraved plate, and none of them are signed by any one. They are prepared and issued in every respect like the State of Virginia's coupons. Now, undoubtedly, if a tax-payer should offer one of the State's collectors a treasury note which the collector in good faith or bad faith refused, the tax-payer would be forced to prove the genuineness of the note affirmatively. But would any one assert that the Legislature of Virginia could pass a valid statute branding all the Government treasury notes as spurious, and imposing upon every holder of one the duty of proving it affirmatively to be genuine? If it may do this, it can effectually destroy the paper currency of the Government.

Any theory that would deny to these coupons the quality of proving themselves would be at war with the financial system of every government in the civilized world.

Within the past hundred years the expansions of trade and commerce have been so enormous that it has been found a physical impossibility to sign manually all the instruments necessary to the conduct of trade. The world has, therefore, been compelled to resort to a substitute for paper signed by an individual, and the substitute adopted is paper taken from an engraved plate. For the past thirty years all the coupons attached to railroad bonds, all attached to the bonds of cities and towns, all attached to bonds of any public character are taken from an engraved plate, and not signed. And there is no risk of counterfeits of these getting into circulation. The counterfeiter gets false paper money into circulation by reason of its currency. But no merchant will take coupons from a stranger in payment for his goods. The counterfeiter, therefore, has no mediums for passing his forged coupons out into the channels of trade. No one will take such securities from a stranger, and no one will buy from him, because his character is known.

So absolutely essential to trade and commerce is a substitute for signed paper of this sort, that I believe most, if not all, governments have provisions of statute law which make them in effect *prima facie* evidence of their own genuineness. Certainly the State of Virginia has had such a statute for sixty years, it being the statute, remarked on later, exempting any one from the necessity of proving any paper genuine unless its genuineness is denied under oath.

Now, the universal sense of mankind being that there must be such a substitute for signed paper of this sort, and that it must have the quality of proving itself, and the nature of the contract itself being such that it cannot begin to fulfil its real purpose unless it is held to be *prima facie* genuine, the Legislature of the State must be held to have intended, when it authorized the issue of these coupons, to modify any then existing law into harmony with the proposition that the coupon should be *prima facie* evidence of its own genuineness.

Upon another ground it seems clear the contract was that the coupon should be *prima facie* evidence of its own genuineness.

The following was the statute law of Virginia when the contract was made:

> "Where a bill, declaration, or other pleading alleges that any person made, endorsed, or accepted any writing, no proof of the handwriting of such person shall be required, unless the fact be denied by an affidavit with the answer, plea, or other pleading which puts it in issue."—Acts of 1869–'70, ch. 271, p. 423.

This chapter was an amendment of the law as it had theretofore been. It had before read as follows:

> "When a declaration or other pleading alleges that any person made, endorsed, assigned or accepted any writing, no proof of the handwriting of such person shall be required, unless the fact be denied by an affidavit with the plea which puts it in issue."—Code of 1860, p. 713, sec. 38.

The amendment, it will be seen, was the addition of the word "bill" at the beginning, and the words "answer or other pleading" at the ending.

Another provision of the statute law was this, found in the chapter of the Code of 1860 making rules for the construction of statutes:

> "The words 'written' and 'in writing' shall be construed to include any representation of words, letters or figures, whether by printing or otherwise."—Code 1860, p. 115, sec. 11.

Another provision of the same chapter was:

> "The word 'person' may extend and be applied to bodies politic and corporate as well as individuals."—P. 115, end of 13th section.

The plea filed in this case avers that the defendant tendered "coupons then due and payable, cut from bonds issued by the plaintiff, under the act of the General Assembly of Virginia approved March 30, 1871." (Record, p. 3.) The act of March 30, 1871, specifies the method in which the bonds are to be executed and issued. They are to be printed from an engraved plate, the bonds to bear the State's seal, and to be signed by the Second Auditor and Treasurer, and the coupons to be signed by the Treasurer or his signature to be engraved upon them. I submit that this, then, was an averment that the coupons were "written" or "in writing," according to the rule of interpretation quoted. In the case of *James River Company* vs. *Littlejohn*, (18 Gratt., 53,) the bill charged (p. 55) that the defendant "drew" an order on the

James River and Kanawha Company, who were indebted to him as a contracter on their canal. The court held that this language brought the averment within the terms of the section, as quoted from the Code of 1860. It said at page 76:

> "Besides, the bill alleges that the order was 'drawn' by Robinett, and this was sufficient under the Code (ch. 171, sec. 38,) to dispense with proof of the signature to the order, in the absence of a denial of it under oath, even though proof had been expressly called for. This provision of the Code furnishes a rule of evidence, and it applied to this case, though the bill was filed before the Code went into operation."

It is the settled law of this court that all the laws in existence when a contract is entered into enter into and form part of that contract; and further, that the obligation of the contract is not to be impaired at all.

It is the settled law of this court—

1st. That the same rules of law are to be applied in construing the contracts of States as in construing the contracts of individuals. A State lays down her sovereignty *quoad hoc* when she enters into a contract.

2d. Under the constitutional inhibition the obligation of the contract is not to be impaired *at all.* It will not do to say the obligation of the contract is only slightly impaired. The contract is to be observed just as made.

3d. When a contract is entered into, the contracting parties are conclusively supposed to have contracted with reference to the then existing laws, and all those enter into and form part of it. This is true of all laws then in existence providing remedies for the enforcement of the contract.

4th. The proposition that the obligation of the contract is not to be impaired in the least applies to any attempt to meddle with the remedy in existence when it is made, as well as to any other part.

### AUTHORITIES TO SUPPORT FIRST PROPOSITION.

"The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the contract of a State or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the promise, is an absurdity."—*Murray* vs. *Charleston*, 96 U. S., 445.

"When a State becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty."—*Davis* vs. *Gray*, 16 Wall., 232.

"When a State descends from the plane of its sovereignty and contracts with private persons, it is regarded, *pro hac vice*, as a private person itself, and is bound accordingly."—*Hall* vs. *Wisconsin*, 103 U. S., 11.

To the same effect is *Cooke* vs. *United States*, 91 U. S. R., at page 398.

### AUTHORITIES TO SUPPORT SECOND PROPOSITION.

"The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligations."—*Green* vs. *Biddle*, 8 Wheat., 84.

"It is not by the Constitution to be impaired at all. This is not a question of degree, or manner or cause, but of encroaching in any respect upon its obligations, dispensing with any part of its force."—*Planters Bank* vs. *Sharp*, 6 How., 327.

"The obligation of a contract is the law which binds the parties to perform their agreement. This prohibition has no reference to the degree of impairment. The largest and the least are alike forbidden."—*Von Hoffman* vs. *Quincy*, 4 Wall., 552.

"It is not by the Constitution to be impaired at all. This is not a question of degree or cause, but of encroaching in any respect on its obligations, dispensing with any part of its force."—*Ib.*, 553.

"Any impairment of the obligation of a contract—the degree of impairment is immaterial—is within the prohibition of the Constitution."—*Walker* vs. *Whitehead*, 16 Wall., 318.

"The constitutional prohibition applies alike to both executory and executed contracts, by whomsoever made. The amount of the impairment of the obligation is immaterial. If there be any, it is sufficient to bring into activity the constitutional provisions and the judicial power of this court to redress the wrong."—*Farrington* vs. *Tennessee*, 95 U. S. R., 683.

"It is not by the Constitution to be impaired at all. This is not a question of degree, or of manner or cause, but of encroaching in any respect on its obligation—dispensing with any part of its force."—*Edwards* vs. *Kearzy*, 96 U. S., 601.

### AUTHORITIES TO SUPPORT THIRD PROPOSITION.

"The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge and enforcement. Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment."—*Walker* vs. *Whitehead*, 16 Wall., 317.

"It is also the settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces those which affect its validity, construction, discharge and enforcement."—*Edwards* vs. *Kearzy*, 96 U. S., 601.

"The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and form a part of them as the measure of the obligation to perform them by the one party and the right acquired by the other."—*McCracken* vs. *Hayward*, 2 How., 612.

"The legal remedies for the enforcement of a contract, which belongs to it at the time and place when it is made, are a part of its obligation."—*Gunn* vs. *Barry*, 15 Wall., 623.

### AUTHORITIES IN SUPPORT OF FOURTH PROPOSITION.

"It is no answer that the acts of Kentucky, now in question, are regulations of the remedy and not of the right to lands. If those acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner they are just as much a violation of the compact as if they directly overturned his rights and interests."—*Green* vs. *Biddle*, 8 Wheaton, 17.

The foregoing language is quoted with approbation by the court in *Bronson* vs. *Kinzie* (1 How. at page 316), and *Edwards* vs. *Kearzy* (96 U. S. at page 601).

> "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tends to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. The Latin proverb, *Qui cito dat bis dat*—he who gives quickly gives twice—has its counterpart in a maxim equally sound, *Qui serius solvit, minus solvit*—he who pays too late pays less. Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition."—*Louisiana* vs. *New Orleans*, 102 U. S., 206–7.
>
> "It is manifest that the obligation of the contract and the rights of a party under it may in effect be destroyed by denying a remedy altogether, or may be seriously impaired by burdening the proceedings with new conditions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law, declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impracticable to pursue."—*Bronson* vs. *Kinzie*, 1 How., 317.

I submit, then, it was part of the coupon contract when it was made, that in any litigation that might arise no proof of the genuineness of the coupon could be called for, unless its genuineness was denied by affidavit. If that was the contract, the provision of the act of May 12, 1887, requiring the taxpayer to assume the burden of proving the coupon genuine, when no denial of its genuineness by affidavit has been made, is plainly an impairment of the obligation of the contract, and the coupon, when produced with a pleading, goes as genuine until its genuineness is denied by affidavit. *

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*Note.—The following communication appeared in the Richmond *Dispatch* of May 16, 1889. The writer is one of the chief executive officers of the State of Virginia, and he has been especially active in framing and securing the passage of the acts of Assembly now before the court. It shows that the only way this controversy can be ended is for the court to hold that the coupon is *prima facie* evidence of its own genuineness, and that the holder cannot be called on to prove it until some one has denied its genuineness under oath:

Although the court should reverse the judgment for the first error assigned, yet it is most earnestly prayed to pass upon each error assigned. If it does not, each one will be made the occasion of more litigation, while, if it passes on all, I

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"OUR 'PATRIOTIC EDITORIAL.'

"*To the Editor of the Dispatch:*

"In your patriotic editorial of yesterday morning you say: 'The members of the Council of Foreign Bondholders are confident that the Supreme Court of the United States will next October give them such a footing as will enable them to coerce the Commonwealth into the acceptance of the terms they last offered, or even of terms more unfavorable to her. We know not what reasons they have for their confident expectation of a decision favorable to their hopes from that high court.'

"Any such expression of confidence is bluff. The points in issue before the Supreme Court do not justify any such expectation, even if they should be decided in their favor. Mr. Royall says there are 'four cases involving all the essential questions, to wit: the duty to produce the bond, the admission of expert evidence, and payment of costs in coupons'—all questions arising under the coupon-crusher.

"Now suppose the Supreme Court shall decide that the State has no right to demand production of the bond, nor to exclude expert testimony. Why, then the Legislature to assemble next winter will define 'expert testimony,' and there will then be another case for the courts.

"At present expert testimony is not defined by statute, but is merely a matter of judicial construction. The construction given by Judge Atkins admitted men who were merely experts in *handwriting* to prove the genuineness of *engraved* or *lithographed* signatures. It was in order to crush this bit of absurdity that the Legislature took the short cut of refusing to permit experts to testify in coupon cases. But it can exclude these so-called experts just as effectually by a statute defining expert testimony. Though even that can hardly be necessary, since Judges Atkins and Latham have been left off the bench. The only thing approaching expert testimony ever given in the coupon cases was by Mr. W. E. Simons, June 22, 1885, in the Hustings Court. He testified that it was impossible to tell whether the Virginia coupons were genuine, because they had no written signatures, but only an *engraved* or *lithographed facsimile*—or forgery of written signatures.

"Mr. Royall said the decision of the Supreme Court would practically end this protracted litigation for one side or the other. That may be the case for his side, but it cannot be for the State, which Mr. Royall has proclaimed to be 'standing on her last leg.' There are many things yet between the State and the seventy or eighty millions which you rightly say these men will claim under such a settlement as they demand, and Mr. Royall, if he persists, will find this State to be a centipede.

"I am delighted to see that you say 'If we were a county or corporation judge, no person within the jurisdiction of our court would be recognized as a fit person to sell liquor who had tried to pay his taxes in coupons.' In that you have touched a chord to which every true Virginian's heart will respond with a patriotic throb.

"What if Mr. Cooper, the English ally of the Virginia *compromisers*, does say he will pay this year about $125,000 of State taxes in coupons? What becomes of the rest of them? This is but a drop in the bucket. The annual crop is but a million, the amount now past due is about $4,500,000, of which $125,000 is about one-fortieth part, or, to the bondholders, one-eightieth part. If they can stand that we can."

believe it will end this controversy. Indeed, the proposition laid down in *United States* vs. *Reese* (92 U. S., 214,) seems to be that in a case of this kind the court is bound to pass upon all the errors assigned. It is true Reese's case was one of a certificate of division between the Circuit and District Judge; but the Chief-Justice says, at page 222:

> "If we reverse, all questions certified which may be considered in the final determination of the case, according to the opinion we express, should be answered."

There can be no difference in principle between answering questions certified that may arise in a further trial and passing on erroneous rulings that are liable to be made on a further trial.

The Dred Scott case (19 How., 393,) is to the same effect. I quote from the syllabus, secs. 6, 7, and 8:

> "Sec. 6. If the court reverses a judgment upon the ground that it appears by a particular part of the record that the Circuit Court had not jurisdiction, it does not take away the jurisdiction of this court to examine into and correct, by a reversal of the judgment, any other errors, either as to the jurisdiction or any other matter, when it appears from other parts of the record that the Circuit Court had fallen into error. On the contrary, it is the daily and familiar practice of this court to reverse on several grounds, where more than one error appears to have been committed. And the error of a Circuit Court in its jurisdiction stands on the same ground and is to be treated in the same manner as any other error upon which its judgment is founded.
>
> "Sec. 7. The decision, therefore, that the judgment of the Circuit Court upon the plea in abatement is erroneous, is no reason why the alleged error, apparent in the exception, should not also be examined, and the judgment reversed on that ground also, if it discloses a want of jurisdiction in the Circuit Court.
>
> "Sec. 8. It is often the duty of this court, after having decided that a particular decision of the Circuit Court was erroneous, to examine into other alleged errors, and to correct them if they are found to exist. And this has been uniformly done by this court, when the questions are in any degree connected with the controversy and the silence of the court might create doubts which would lead to further useless litigation."

The reporter's syllabus is made up from what was said by the court at pp. 428–9.

Supposing the court should hold the act of May 12, 1887, to be unconstitutional and void, and all proceedings taken under it void, that would make this case and the Dred Scott case, so far as the present point is concerned, exactly the same. The first point decided in the Dred Scott case was that Dred Scott could not sue in a Federal court. This ended the jurisdiction of the court in the cause, yet the court went on to correct other errors that the Circuit Court had fallen into, and laid down the foregoing law as its reason for doing so. Even though the further questions in the case at bar should never arise again in this case, it is obvious that they are all liable to arise in a thousand other cases and will have finally to be determined here.

WM. L. ROYALL,
*For Plaintiff in Error.*

# APPENDIX A.

## McGAHEY vs. VIRGINIA.

Herein is given a chronological account of the legislation of Virginia since she undertook to repudiate her public debt, as that legislation bears upon that undertaking, together with the decisions of this court on the validity of that legislation, with remarks showing how each act was the result of some decision here and intended to defeat its practical effect.

Prior to the general election for members of the Legislature and Governor, in the fall of 1881, the question of forcing or not forcing a readjustment of the public debt had been the principal political issue in Virginia for five years. In the fall of 1881 the political party which favored its readjustment carried the State for both branches of the Legislature and elected their candidate for Governor. Amongst its first acts was the passage of a new funding act, which repudiated nearly one-half of the debt as it then stood outright, and gave no security for the interest on the new bonds to be issued under it, although the bonds then existing bore tax-receivable coupons for the interest. This act can be seen at page 88 of the acts of 1881–'2. It is commented on by Mr. Justice Matthews (114 U. S. R., p. 305,) sufficiently to be understood. It forbade the payment of interest upon any bonds except those issued under its provisions (sec. 15).

The difficulty about getting bondholders to fund into the new bonds was the tax-receivable coupons attached to the old bonds. As long as they could sell their coupons to the State's tax-payers, and they could pay their taxes with them, it was evident they would never fund. Accordingly the new funding act was supplemented by two others, which were immediately dubbed by the public "Coupon-Killer No. 1" and

"Coupon-Killer No. 2," and as those terms have now become part of the vernacular, they will be used here to designate those acts.

These acts threw such impediments in the way of using coupons for taxes that it was believed the bondholders would find it more to their interest to fund their bonds than to rely on selling their coupons to the State's tax-payers.

The first of these, "Coupon-Killer No. 1," provided that when coupons were tendered for taxes the collector should receive them, requiring the tax-payer at the same time to pay his taxes in money. He should seal his coupons in an envelope and certify them to the Hustings or County Court, which should impanel a jury to try whether they were genuine or not. If the jury found them genuine, they were to be put into the treasury and the tax-payer's money returned to him. This act was held constitutional by this court, as a substitute for *mandamus* to compel the collectors to receive coupons in payment of taxes, in *Antoni* vs. *Greenhow*, (107 U. S. R.,) and it is set out in full at page 771, *ib.* "Coupon-Killer No. 2" forbade the State's collectors to receive anything in payment of taxes due her except gold, silver, United States treasury notes, and national bank currency. It is as follows:

"CHAP. 41.—**An Act to provide for the more efficient collection of the revenue to support government, maintain the public schools, and to pay interest on the public debt.**

Approved January 26, 1882.

"1. Be it enacted by the General Assembly of Virginia, That the several tax collectors of this Commonwealth shall receive, in discharge of the taxes, license-taxes, and other dues, gold, silver, United States treasury notes, national bank currency, and nothing else: provided, that in all cases in which an officer charged by law with the collection of revenue due the State shall take any steps for the collection of the same, claimed to be due from any citizen or tax-payer, such person against whom such step is taken, if he conceives the same to be unjust or illegal, or against any statute, or to be unconstitutional, may pay the same under protest, and under such payment the officer collecting the same shall pay such revenue into the State treasury, giving notice at the time of such payment to the Treasurer that the same was paid under protest. The person so paying such revenue may at any time within thirty days after making such payment, and not longer thereafter, sue the said officer so collecting such revenue, in the court having jurisdiction of the parties and amounts. If it be determined that the same was wrongfully collected, for any reason going to the merits of the same, then the court trying the case may certify of record that the same was wrongfully paid and ought to be refunded; and thereupon the Auditor of Public Accounts shall issue his proper warrant for the same, which shall be paid in preference to other claims on the treasury, except such as have priority by constitutional requirement. There shall be no other remedy in any case of the collection of the revenue, or the attempt to collect revenue illegally, or the attempt to collect revenue in funds only receivable by said officers under this law, the same being other and different funds than the tax-payer may tender or claim the right to pay, than such as are herein provided; and no writ for the prevention of any revenue claim, or to hinder or delay the collection of the same, shall in anywise issue—either injunction, supersedeas, mandamus, prohibition, or any other writ of process whatever; but in all cases for any reason any person shall claim that the revenue so collected of him was wrongfully or illegally collected, the remedy for such person shall be as above provided, and in no other manner. In all such cases, if the court certify of record that the officer defendant acted in good faith and diligently defended the action, the necessary costs incurred by him shall be taxed to and paid by the State, as in criminal cases. The Commonwealth's attorney for the county or corporation in which suit is brought shall appear and represent the defence. In every case where judgment is rendered for the defendant, a fee of five dollars shall be taxed in favor of said attorney and against the plaintiff; and whenever the court shall refuse to certify the good faith and diligence of the officer defending the case, a like fee of five dollars shall be taxed against the said officer. Any officer charged with the collection of revenue, who shall receive payment thereof in anything other than that hereinbefore provided, shall be deemed guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars in the discretion of the court; but nothing herein contained shall be construed to subject any officer of the State to any suit, other than as hereinbefore provided, for any refusal on his part to accept in payment of revenue due the State any kind or description of funds, security, or paper not authorized by this act.

"2. This act shall be in force from and after the first day of December, eighteen hundred and eighty-two."

The statute law has always been that the collectors of taxes shall levy for them if no sufficient payment is made. (Acts 1878–'9, p. 318, referring to previous laws.) So that this act was the same as to say that levies should proceed as if nothing had been tendered, in case the tax-payer refused to pay his tax in money and sue on his coupons to recover it back.

When this court decided, in *Antoni* vs. *Greenhow*, that the act of January 14, 1882, provided a sufficient substitute for the writ of *mandamus*, *as a means for compelling the State's officers to receive coupons*, the whole body of the people of Virginia jumped to the conclusion that all controversy over the coupons was ended. They thought the only way the coupon could be made available was by proceedings to compel the collectors to receive them, and they believed the impediments thrown in the way of this by "Coupon-Killers Nos. 1 and 2" would make it impossible for the bondholders to make any satisfactory use of their coupons. They wholly ignored the converse proposition, left open by the court, that if the tax-payer chose to tender his coupon and rest there, the State would be powerless to make him pay anything else. But they were very soon aroused from this sense of security. *Antoni* vs. *Greenhow* was decided in March, 1883. On the 15th of May, 1883, Hon. H. L. Bond, United States Circuit Judge for the District of Virginia, decided that the tender of coupons paid the tax; that it was a trespass to levy for the tax after such tender, and that the officer attempting it would be enjoined from making such levy. This case came to this court by appeal, when the ruling was affirmed in May, 1885, (*Allen* vs. *B. & O. R. R. Co.*, 114 U. S. R., 311,) and the record is on file in its clerk's office. An inspection of the preliminary injunction at page 1 will show that it was awarded on the 15th of May, 1883, and the opinion of the judge, also in the record, shows that he declared the law to be, as above stated, on the same day. This ruling, of course, put a very serious aspect on affairs. It had to be met in some way or it would manifestly undermine all the acts that had been passed. The Legislature was not in session in May, 1883, and did not meet until December, 1883. In a few days after it met it passed joint resolutions, approved December 21, 1883, declaring that it was vain for the creditors to hope to induce the State to grant better terms than the funding act of 1882. These resolutions read as follows:

"Joint Resolutions of both houses of the Legislature, approved by the Governor December 21, 1883, as follows:

"The questions of the ascertainment and settlement of the debt of the State having for thirteen years profoundly agitated the people of Virginia, persistent, repeated, and earnest but unavailing efforts having been made by a large body of the citizens and taxpayers of the State to effect and carry out a settlement of this debt, under which a much larger sum would have been recognized and assumed by the act approved February 14, 1882, popularly called the 'Riddleberger Bill,' resulting in political contests which have convulsed the popular mind, given repeated and ruinous shocks to the business interests of the State, retarded the prosperity and threatened the safety of the people, and all of the issues involved in the final adjustment of this debt having at length, in the years 1881 and 1882 and 1883, after years of discussion and controversy, been submitted to the arbitrament of the people and the courts, and the people having, after thorough canvass of the questions of fact and right involved, given their sanction at the polls to the measures, modes, and principles of settlement substantially involved in the 'Riddleberger Bill,' and the highest courts of Virginia and of the United States having sanctioned the validity and constitutionality of the law designed to give effect to the adjustment thus enacted; and it being of imperative importance to the people of Virginia, and essential to the security of the public creditors, that this settlement shall be taken as a finality, and that further agitation and controversy shall cease: therefore,

"1. Be it resolved by the General Assembly of Virginia, That the people of Virginia have accepted the act of February 14, 1882, known as the 'Riddleberger Bill,' as the ultimate settlement of the debt of the State; that it is their unalterable purpose that that settlement shall be final, and that any expectations that any settlement of the debt of this State upon any other basis will ever be made or tolerated by the people of Virginia alutely illusory and hopeless.

"2. That the interests of the public creditors, as well as the safety and welfare of the State, require that this settlement shall be accepted by the creditors as well as by the State, and therefore the General Assembly of Virginia on behalf of all the people of the State, hereby advise and call upon the holders of the bonds and claims against the Commonwealth to come forward with promptness and fund the same under the provisions of the act of February 14, 1882."—Acts 1883-'84, p. 7.

And again on the 19th of March, 1884, it, by a preamble, resolved as earnestly as before that it would destroy the coupon if the creditor did not fund; and, by way of giving emphasis to the threat, it provided in that resolution that whenever a coupon found its way into the treasury it should be charged up against the principal of the bond, and when enough had been so charged that the bond should be deemed paid. This act is as follows:

"**Chap. 540.—An Act to provide a Sinking Fund for Tax-receivable Coupon Bonds.**

Approved March 19, 1884.

"Whereas it is the intention of the General Assembly, so far as they have the power, to cause the basis of settlement provided in the act entitled an act to ascertain and declare Virginia's equitable share of the debt created before, and actually existing at the time of, the partition of her territory and resources, and to provide for the issuance of bonds covering the same, and the regular and prompt payment of interest thereon, approved February fourteenth, eighteen hundred and eighty-two, to apply alike to all the holders of the bonds of the State; and whereas many of the bondholders have not accepted the provisions of said act, by reason whereof it has been impossible to prevent coupons being paid into the treasury for taxes, the holders of the tax-receivable coupon bonds in that way enforcing the payment of a higher rate of interest than is provided by the above-recited act: therefore,

"1. Be it enacted by the General Assembly of Virginia, That the Second Auditor shall open an account in his office, to be known as the tax-receivable coupon bond sinking fund account, in which he shall be required to enter the number, amount, and date of each coupon that may be paid into the treasury for taxes; and he shall ascertain what amount of each of such coupons that may thus be paid into the treasury would have been payable under the act recited in the preamble to this act, if the bond from which the coupon was clipped had been funded under said act, which amount, so ascertained, he shall deduct from the amount of the coupon, and the balance remaining shall be charged to the bond from which the coupon was clipped, as a payment upon the principal of such bond, and shall be deducted from the same at maturity.

"2. This act shall be in force from its passage."—Acts 1883–'4, p. 721.

To make the threat still more effectual, it enacted a number of statutes, each having a specific object in view. One forbade any person to sell the State's coupons to her tax-payers unless he paid her a special license-tax of $1,000 per annum and twenty per cent. of the face value of the coupons sold. (With coupons worth thirty cents on the dollar, as they were when this act was passed, very little was left to the bondholder and the broker.) This act is as follows:

"**Chap. 450, sec. 65, of the Acts of 1883-'4.—Tax-receivable Coupons**

"65. No person shall sell tax-receivable coupons from bonds of the State of Virginia without a special license, for which privilege he shall pay one thousand dollars for each office or place of business kept for that purpose. In addition thereto, he shall pay to the State a tax of twenty per centum upon the face value of all tax-receivable coupons sold by him. At the time of making such sales he shall give to the purchaser a printed certificate, signed by him, stating the fact that he has sold such coupons to the purchaser, naming him. The said certificate shall also contain the number and amounts of the said coupons and the date of sale. Whenever such coupons are tendered for taxes, the broker's certificate shall be delivered to the collector. The said collector shall preserve the same until the first day of the following month, when he shall collect the said tax of twenty per centum from the said broker. But any stock broker may purchase such coupons for the purpose of funding them in new three per centum bonds of Virginia."—Acts 1883-'4, p. 590.

(This act has been since amended so as to take in those who tender coupons for another.)

It enacted further that no attorney at law should bring a suit under "Coupon-Killer No. 1" to recover back money where coupons had been tendered for taxes, unless he paid, in addition to his general license-tax as an attorney at law, a special license-tax of $250 for that privilege.

The act is as follows:

"Section 90 of chapter 450 of the Acts of 1883-'84 provides that every attorney at law shall take out a revenue license in addition to his license to practise law. It then provides:

"A revenue license to practise law in any county or corporation shall authorize such attorney to practise in all the courts of this State without additional license."

Section 91 is as follows:

"Every attorney at law who has been licensed for less than five years shall pay fifteen dollars; and all attorneys who have practised for five years and more twenty-five dollars: provided that no attorney at law shall be required to pay more than fifteen dollars whose receipts are less than five hundred dollars per annum: provided further, no attorney licensed under this act shall be allowed to bring suit against the Commonwealth, or any treasurer or collector of taxes, for the recovery of money for coupons tendered for taxes, unless he take out a special license therefor; for which privilege he shall pay a specific license-tax, in addition to the tax required under this section, of two hundred and fifty dollars."—Acts 1883–'4, p. 596.

It provided further that whenever a judgment was rendered against the State under "Coupon-Killer No. 1," the attorney for the Commonwealth should take an appeal, whether there were grounds for it or not. Of course the plain object of this act was to have many thousand cases pending upon the docket of the appeal court, which would postpone suitors so long they would give up the contest.

This act is as follows:

**"CHAP. 397.—An Act to give an appeal as of right to the Commonwealth in all cases where suits are instituted under the act approved January 14, 1882, entitled an act to prevent frauds against the Commonwealth and the holders of her securities in the collection and disbursement of revenues.**

**Approved March 12, 1884.**

"1. Be it enacted by the General Assembly of Virginia, That in all proceedings in any court of the Commonwealth, under the act approved January fourteenth, eighteen hundred and eighty-two, entitled an act to prevent frauds on the Commonwealth and the holders of her securities in the collection and disbursement of revenues, and under the act approved January twenty-sixth, eighteen hundred and eighty-two, entitled an act to provide for the more efficient collection of the revenue to support the government, maintain the public schools, and to pay interest on the public debt, it shall be the duty of the attorneys for the Commonwealth to defend the suits, and if a case be decided against the Commonwealth it shall be his duty to appeal to the court above, and such appeal shall be a matter of right; and where an appeal is taken to the Court of Appeals it shall be the duty of the clerk of the Circuit Court from which the appeal is taken to deliver a copy of the record to the clerk of the Court of Appeals as soon as practicable, in like manner as is provided in the sixteenth section of chapter one hundred and seventy-eight of the Code of eighteen hundred and seventy-three in the cases of appeal to the Circuit Courts.

"2. In all suits arising under the aforesaid acts which may be brought into the Federal courts, it shall be the duty of the Attorney General to appear as counsel for the Commonwealth, or the collector of taxes, to defend such suits, and if the judgment be against the Commonwealth, or the collector of taxes, to take an appeal to the Supreme Court of the United States.

"3. Any Commonwealth's attorney failing to carry out the provisions of this act shall be deemed guilty of a misdemeanor, and shall be fined not less than fifty nor more than one hundred dollars.

"4. This act shall be in force from its passage."—Acts 1883–'4, p. 504.

"Coupon-Killer No. 2" forbade any court to enjoin a collector from levying on a tax-payer's property after a tender of coupons, and the third section of an act approved March 13, 1884, forbade any one to sue a collector for damages for levying on his property after a tender of coupons.

This act is as follows:

"CHAP. 421, section 3, of An Act to amend the act approved January 26, 1882, entitled an act to provide for the more efficient collection of the revenue, &c.

Approved March 13, 1884.

"3. No action of trespass or trespass on the case shall be brought or maintained against any collecting officer for levying upon the property of any tax-payer who may have tendered in payment, in whole or in part, any coupons, or paper purporting to be a coupon, cut from bonds of this State, for such taxes, and who shall refuse to pay his taxes in gold, silver, United States treasury notes, or national bank notes."—Acts 1883–'4, p. 527.

It also forbade absolutely the receipt of coupons for license-taxes, whether straight-out or under "Coupon-Killer No. 1." This act is as follows, being section 112 of an act approved March 15, 1884:

"112. All applications for licenses shall be made, and all taxes assessed by chapter one of this act shall be paid in lawful money of the United States," &c.—Acts 1883–'4, p. 603.

These measures made it impossible, so far as her statutes could make it, for a tax-payer to use her coupons.

Now it will be observed that there had been no legislation hostile to the coupons since "Coupon-Killers Nos. 1 and 2," enacted in January, 1882, and that Judge Bond's decision, in May, 1883, had seriously alarmed the statesmen, and that as soon thereafter as the Legislature met, to wit, in December, 1883, it commenced a new series of hostile legislation, and crowded all the important measures quoted into the period between December, 1883, and April, 1884.

Matters rested in this form until the spring of 1885, when this court decided, in the case of *Poindexter* vs. *Greenhow* (114 U. S. R.), brought here to establish the proposition that *Antoni* vs. *Greenhow* (107 U. S.) did not decide that a collector might levy after a tender of coupons, and the court, after going over the whole ground, held that the tender of coupons paid the tax, and that it was a trespass for a collector to levy after such tender, for which he would be responsible in damages to the tax-payer. This decision resulted in no immediate good to the tax-payers, because it was useless to bring suits for damages in the State's courts, and the United States Circuit Judge decided that no suit for damages could be brought in the United States Circuit Court unless the tax levied for was $500 in amount, (this was when $500 was the test of the court's jurisdiction,) and but few persons paid that much tax. Meantime, the State authorities went on forcing tax-payers to pay in money, notwithstanding this court's decision in *Poindexter* vs. *Greenhow*. But, on the 20th of April, 1886, this court held, in *Barry* vs. *Edmunds* (116 U. S., 550,) that the smallest tax-payer might sue for damages in the United States Circuit Court, where he had been levied on after a tender of coupons, although both were citizens of Virginia, (*Smith* vs. *Greenhow*, 109 U. S. R., 669,) and in *Royall* vs. *Virginia*, that after a tender of coupons for a license-tax the party offering them might go on with his business without any license. These decisions brought on a real issue between the State and her tax-payers. The tax-payers now had their rights authoritatively adjudged, and they had secured an impartial tribunal in which they could seek justice when outraged in those rights.

Hostilities at once commenced actively, the tax-payers tendering coupons and refusing to pay anything else; the State's collectors levying on and selling their property, and the tax-payers replying with actions for damages against the collectors in the United States Circuit Court. But the Legislature by no means remained quiet. It was in session when the last-mentioned cases were decided by this court, and it went to work at once.

On the 21st of January, 1886, it passed an act providing that whenever one of the State's coupons was called in question, no testimony of experts should be heard to prove it genuine (although all of them were printed from an engraved plate, and none were signed manually); and on the 26th of January, 1886, it passed another act, providing that whenever one was called in question the bond from which it came might be called for and the party offering the coupon should be required to produce it. (This act has been so amended since as to forbid judgment that the coupon is genuine unless the bond is produced.)

These acts are as follows:

**"CHAP. 45.—An Act to amend and re-enact section 39 of chapter 167, Code 1873, in relation to rules, pleadings, and evidence.**

Approved January 21, 1886.

"1. Be it enacted by the General Assembly of Virginia, That section thirty-nine of chapter one hundred and sixty-seven of the Code of eighteen hundred and seventy-three, in relation to rules, pleadings, and evidence, be amended and re-enacted so as to read as follows:

"39. Where a bill, declaration, petition, or other pleading, alleges that any person made, endorsed, assigned, or accepted any writing, no proof of the handwriting of such person shall be required, unless the fact be denied by affidavit, with the answer, plea, or other pleading which puts it in issue: provided, that no such affidavit shall be required where the signature of the maker, endorser, assignor, or accepter of any paper is not in the personal handwriting of the party to be charged, or his agent, but was made by machinery, or in other manner than by the actual or personal handwriting of the party to be charged, or his agent; then in all such cases the burden of proving such paper to be genuine shall be upon the party relying upon the paper so offered to be read in evidence: and it is further provided that expert evidence shall not be received to prove the genuineness of any paper or instrument made by machinery, or in any other manner than by the actual or personal handwriting of the party to be charged, or his agent.

"2. All acts and parts of acts inconsistent with this act are hereby repealed.

"3. This act shall be in force from its passage.—Acts 1885-'6, p. 36.

This act has been declared constitutional by the Court of Appeals of Virginia.

**"CHAP. 49.—An Act to prescribe a rule of evidence in certain cases.**

Approved January 26, 1886.

"1. Be it enacted by the General Assembly of Virginia, That in the trial of any issue involving the genuineness of a coupon, appearing or purporting to have been cut from any bond authorized by law to be issued by the State of Virginia, or by any city, county or corporation, the defendant may demand the production of the bond; and thereupon it shall be the duty of the plaintiff to produce such bond, with proof that the coupon was actually cut therefrom.

"2. This act shall be enforced from its passage."—Acts 1885–'6, p. 40.

On the first of March, 1886, it passed an act providing that any lawyer who gave the benefit of his professional services to any one asserting legal rights based on the State's coupons should be guilty of barratry and be disbarred, and on the first of March, 1886, it passed another, providing that whoever, not being a lawyer, should give any one assistance in making good his rights, based upon her coupons, should be guilty of champerty, and fined $300 and imprisoned sixty days.

These acts are as follows:

"CHAP. 347.—An Act to define and punish Barratry.

Approved March 1, 1886.

"1. Be it enacted by the General Assembly of Virginia, That any person licensed to practise law in any of the courts of this Commonwealth, who shall solicit, procure or induce, or become a party to soliciting, procuring or inducing, any suit or action to be brought, any petition to be filed, or any motion to be made against the State of Virginia, or any citizen thereof, by verbal representations, or by writing or printing, shall be deemed guilty of the offence of barratry.

"2. That when upon the complaint of the State, through any of its officers, or of any other defendant in a suit or petition, it shall appear to the Commonwealth's attorney, in any court of the Commonwealth, that there is reasonable ground to suspect the perpetration of such offence, it shall be his duty to summon the plaintiff on petition, his agent or agents, and any other witness he may think proper to summon, to testify in the case; and if it shall appear that the plaintiff or petitioner's counsel has solicited, procured or induced such suit or petition, or become a party thereto, then it shall be the duty of the court to declare such counsel guilty of barratry; and it shall revoke his license and disbar him forever from practising law in the courts of this Commonwealth.

"3. This act shall be enforced from its passage."—Acts 1885–'6, p. 384.

"CHAP. 238.—An Act to define and punish Champerty.

Approved February 26, 1886.

"1. Be it enacted by the General Assembly of Virginia, That any person who shall solicit, procure or induce, or become a party to soliciting, procuring or inducing, any suit or action to be brought, any petition to be filed, or any motion to be made against the State of Virginia, or any citizen thereof, by verbal representation, or by writing or printing, shall be deemed guilty of the offence of champerty, and upon conviction thereof shall be adjudged guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred nor more than three hundred dollars for each offence, or by imprisonment for not more than sixty days, or by both, in the discretion of the jury.

"2. This act shall be enforced from its passage."—Acts 1885-'6, p. 249.

On the 27th of February, 1886, it passed an act of limitations respecting the coupons, although on their face they are receivable at any time in the future. In other words, it forbade its officers to pay them; it forbade them to receive the coupons for taxes, and it made it as nearly impossible for the tax-payer to compel the officer to receive them by legal proceedings as it could make them, and then provided that unless they were made use of within a limited period they should not be used at all. This act provides that all coupons becoming due *prior* to July 1, 1888, should be barred unless brought to judicial test between July, 1888, and July, 1889; and that all becoming due *after* July, 1888, should be barred unless brought to judicial test within one year from the time they became due. The act is as follows:

"Approved February 27, 1886.

"Be it enacted by the General Assembly of Virginia, That from and after the first day of July, 1888, no petition shall be filed, or other proceeding had or instituted, to try the question as to whether any paper in print, writing, engraving, or lithographing, purporting to be a coupon detached from or attached to any bond of the State of Virginia, is a genuine legal coupon, legally receivable for taxes, debts, dues and demands due the State, except as follows: that is to say, where such paper purports upon its face to have first become so receivable on or at any time prior to the first day of July, 1888, such petition shall be filed or other proceeding had or instituted to try such question within one year from the first day of July, 1888, and not after; and when such paper purports upon its face to have first become so receivable at any time subsequent to the first day of July, 1888, such petition shall be filed or other proceeding had or instituted to try such question within one year from the time such paper purports to have first become so receivable, and not after."—Acts 1885-'6, p. 312.

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On the 4th day of March, 1886, it passed another act, providing that when coupons were tendered for a license-tax they should be received for verification only, under the provisions of "Coupon-Killer No. 1"; that while the process of verification was going on the party applying for a license should do no business (having already by the bond act and the expert-evidence act made it impossible for any one to verify).

This act is as follows:

"CHAP. 415.—An Act to prevent frauds upon the Commonwealth and the holders of her securities in the collection and disbursement of revenue; and to repeal section 112 of an act approved March 15, 1884, entitled an act to provide for the assessment of taxes, &c.; and to repeal an act approved February 7, 1884, entitled an act to regulate the granting of licenses, &c.; and to repeal an act approved February 25, 1884, entitled an act to regulate granting of licenses, &c.

Approved March 4, 1886.

"1. Be it enacted by the General Assembly of Virginia, That every person or firm, partnership or association, express, telegraph, telephone, and every incorporated company, which now is or may be required to obtain a license, in order to do business in this State, desiring to obtain such license, shall make application therefor, in writing, to the commissioner of the revenue of the county or corporation wherein such business is proposed to be conducted, or to the Auditor of Public Accounts, in such cases as he is authorized by law to issue a license, in which application it shall be stated the nature of the business, the residence of the applicant, the place where it is proposed to conduct such business, the amount of the assessment prescribed by law as a condition precedent to the issuing of such license, accompanied by the certificate, in writing, by the treasurer of the county or corporation wherein such business is proposed to be conducted, stating that said amount, in coin, legal-tender notes, or national bank bills, has been deposited with him by said applicant: provided, however, in such cases as the Auditor of Public Accounts is authorized by law to issue licenses, such deposit as herein provided for shall be made with him at the time such application is presented, instead of with the treasurer: provided that if such applicant shall make tender of any papers or instruments in print, writing or engraving, purporting to be coupons detached from bonds of the Commonwealth, issued under the act approved the thirteenth day of March, eighteen hundred and seventy-one, entitled an act to fund the public debt, or under the act approved March the twenty-eighth, eighteen hundred and seventy-nine, entitled an act to provide a plan of settlement of the public debt, in payment of any such assessment prescribed by law, the Treasurer or Auditor, as the case may be, to whom such tender is made, shall receive such coupons for identification and verification, in accordance with the provisions of act of Assembly approved January fourteenth, eighteen hundred and eighty-two, entitled an act to prevent fraud upon the Commonwealth, and the holders of her securities in the collection and disbursement of revenues. But no license shall issue, nor shall the applicant therefor have the right to conduct any business or pursue any profession, trade or calling, for which such license is required by law, unless and until the said coupons have been verified in the manner prescribed by said act of fourteenth January, eighteen hundred and eighty-two.

"2. Upon receipt by the commissioner of the revenue, or Auditor, as the case may be, of an application of a person or firm, partnership or company, who has complied with the foregoing section, he shall endorse said application as follows: I find the within application correct and in due form, and accompanied with the certificate in writing of the treasurer of the county, or corporation, that the sum of ——— dollars, in gold or silver coin, or United States treasury or national bank notes, has been deposited with the said treasurer; or that coupons have been tendered by the applicant, and verified, as required by the first section of this act; or that the same accompanied the application and was deposited with the Auditor, as the case may be; to which endorsement he shall sign his name and file said application in his office, furnishing the applicant with a duplicate copy of the same. If it shall appear that all the provisions of this act have been complied with, then the court or person having authority to grant or issue such license, may hear the application, and if in due form, may grant such license: provided that in case such license shall be refused, such refusal shall be entered upon such application and the same returned to the applicant, who, upon presenting said application, endorsed with such refusal, to the officer with whom the deposit was made, shall have the same returned to him by the said officer.

"3. No application for a license to do any business or to follow any profession, trade or calling, in this State, shall be made, and if made shall not be considered, except in pursuance of this act; and no such license shall be granted unless all the requirements of this act shall have been first complied with; and any license granted or obtained in violation of the provisions of this act shall be null and void, and the person or persons, firm or association, joint stock or incorporated company, which may obtain such license, and attempt to do business thereunder, shall be deemed to violate the law, and shall be liable to all the forfeitures, pains and penalties for such violation, and in the same manner as if no such license had been obtained, and in addition thereto fined not less than fifty dollars nor more than five hundred dollars.

"Any assessor, treasurer, or other officer, charged with any duty pertaining to the granting of licenses, who shall violate this act, shall be guilty of misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than five hundred dollars.

"4. The Auditor of Public Accounts shall forthwith have prepared and furnished to commissioners of the revenue of this State blank forms of applications for licenses required to be made in writing by this act.

"5. Section one hundred and twelve of an act approved March fifteenth, eighteen hundred and eighty-four, entitled an act to provide for the assessment of taxes on persons, property and income, and imposing taxes thereon for the support of the government and public free schools, and to pay the interest on the public debt, and to provide for the mode of applying for licenses to transact any business in this State, and prescribing the amount to be paid as a condition precedent to the right to transact such business; and an act entitled an act to regulate the granting of licenses for the exercise o any privilege, approved February seventh, eighteen hundred and eighty-four, and an act entitled an act to amend and reenact sections one and two of an act entitled an act to regulate the granting of licenses for the exercise of any privilege, approved twenty-fifth of February, eighteen hundred and eighty four, are hereby repealed.

"6. This act shall be in force from its passage."—Acts 1885-'6, p. 467.

On the 26th of February, 1886, it passed an act constituting a Board of Indemnity, which was authorized to pay any collector out of the State's treasury, whatever he was required to pay as damages, or in any other way, for forcing taxpayers to pay in money after they had tendered coupons.

This act is as follows:

"Approved February 26, 1886.

"**Chap. 216.—An Act authorizing a board, consisting of the Attorney-General, Secretary of the Commonwealth, Auditor of Public Accounts, Second Auditor, and Treasurer, to allow to tax-collecting officers losses and expenses incurred in collecting or attempting to enforce or settle taxes due the Commonwealth.**

"1. Be it enacted by the General Assembly of Virginia, That upon the application of any officer charged with the duty of collecting or settling taxes due the Commonwealth, a board, consisting of the Attorney-General, Secretary of the Commonwealth, Auditor of Public Accounts, Second Auditor, and Treasurer, shall be authorized to ascertain and allow to such officer such sums of money as they may deem just and proper to cover any liability and expenses incurred by and any loss or damage accrued to such officer, as the result of his collecting or attempting to collect, enforce or settle taxes due the Commonwealth; and for the amount so ascertained and allowed the Auditor shall draw his warrant in favor of such officer upon the Treasurer, and the same shall be paid out of money in the treasury not otherwise appropriated. The said board may prescribe rules and regulations in reference to such applications and allowances if they shall deem proper so to do; but no such allowance shall be made unless the said board shall be satisfied that such officer used due diligence in protecting and defending the interests of the Commonwealth in the matter touching which such allowance is asked for.

"2. In case any such allowance is applied for by the Auditor, it shall be competent for the other members of said board to pass upon and allow the same with the same effect as if the Auditor were not a member of said board; but the Auditor shall not act as a member of said board in passing upon his own claim.

"3. This act shall be in force from its passage."—Acts 1885-'6, p. 228.

The officers constituting the Board of Indemnity at once issued the following circular to the collectors of taxes:

"CIRCULAR.

"Office of the Auditor of Public Accounts,
"Richmond, March 23, 1886.

"*To the Treasurers of the Counties and Corporations of the Commonwealth:*

"The following instructions are given for your guidance:

"1. If coupons are tendered in payment of capitation tax, or in payment of the tax on land or personal property assessed for the support of public free schools, the treasurer will refuse to receive them, and require payment in gold or silver coin, United States treasury notes, or national bank notes. Should such payment not be made, the treasurer will levy for such tax.

"2. If coupons are tendered for the tax on land or personal property assessed for the support of government, and at the same time payment of the said tax is made in gold or silver coin, United States treasury notes, or national bank notes, the treasurer will receive the coupons for identification and verification, as directed by the act of January 14, 1882, commonly known as 'Coupon-Killer No. 1.' If such payment in money be not made, the treasurer will decline to receive the coupons for identification and verification and will levy for said tax.

"3. If coupons are tendered for the sum prescribed by law as a condition precedent to the issuing of a license, and the said sum be at the same time deposited in gold or silver coin, United States treasury notes, or national bank notes, the treasurer will receive the coupons for identification or verification, in accordance with the provisions of said act of January 14, 1882, ('Coupon-Killer No. 1,') and will give the certificate necessary to enable application to be made for the license. Should the party tendering the coupons decline to make the said deposit in gold or silver coin, or United States treasury notes, or national bank notes, the treasurer will, nevertheless, receive the coupons for identification and verification, in accordance with said act of January 14, 1882, and forward them to the County or Corporation Court; and when the coupons are returned to him, with a copy of the order of the court certifying that they have been proved to be genuine, legal coupons, receivable for taxes, he will give the certificate required to enable application to be made for a license; but he will not give said certificate until he receives said order of the court.

"4. When coupons are tendered and not received by the treasurer under these instructions, the treasurer shall record the bond number, coupon number, and amount and date of each of such coupons, and preserve said record.

"5. If any person shall engage in or exercise any business, employment or profession, without a license, if a license be required by law, he shall be reported by the treasurer to the attorney for the Commonwealth, who will proceed against him according to law, and prosecute the suit to a conclusion, without compromise or case agreed.

"6. If any treasurer shall be sued by any tax-payer, or his agent or representative, for discharging the duties of his office according to the instructions given above, it shall be the duty of the attorney for the Commonwealth for the court in which such suit may be brought, or the Attorney-General, if such suit is brought in the Circuit Court of the city of Richmond or in the Circuit Court of the United States when notified by the treasurer, to defend it as for an officer of the State who has done his duty under the law; and if damages are found against such an officer he will be relieved according to the provisions of an act approved February 24, 1886, entitled 'an act authorizing a board, consisting of the Attorney-General, Secretary of the Commonwealth, Auditor of Public Accounts, Second Auditor, and Treasurer, to allow collecting officers' losses and expenses incurred in collecting or attempting to enforce or settle taxes due the Commonwealth,' when the said board shall be satisfied that such officer used due diligence in protecting and enforcing the interests of the Commonwealth in the matter touching which such allowance is asked.

Very respectfully,

MORTON MARYE,
*Auditor of Public Accounts.*

We approve the foregoing instructions:

"F. G. RUFFIN, Second Auditor,
"R. A. AYRES, Attorney-General,
"H. W. FLOURNOY, Sec'y of the Com'th,
"MORTON MARYE, Aud'r of Pub. Acc'ts,
"A. W. HARMAN, Jr., Treas'r of the Com'th,
} *Members of the Board of Indemnity.*"

A pause is taken here for a brief retrospect. When, in April, 1886, the decisions of *Barry* vs. *Edmunds* and *Royall* vs. *Virginia* were added to *Poindexter* vs. *Greenhow*, it was very evident that, so far as the State's legislation was concerned, the doors of her treasury were thrown very widely open to the admission of coupons, and the legislation adopted in the spring of 1886 was manifestly enacted to meet the condition of things that had been brought about by those decisions. That legislation belongs to two classes. "Coupon-Killer No. 2" was never resorted to as a remedial proceeding by tax-payers, but "Coupon-Killer No. 1" was very much used, and, to the surprise of its framers, it proved to be an available method for proving coupons and paying taxes with them. A number of the acts adopted in the spring of 1886 were aimed at rendering that measure less available as a remedy on coupons. The acts requiring the bond to be produced, forbidding the use of expert testimony, denouncing the punishment of barratry against lawyers and of champerty against other than lawyers, were all intended to add embarrassment when it was sought to prove coupons under "Coupon-Killer No. 1." The act forbidding a person to do business until coupons tendered for his license-tax had been verified, and creating the Board of Indemnity were intended to break down the practice of standing on a tender of coupons and refusing to pay anything else. The act barring coupons by limitation was one *sui generis* intended to affect both sides of the matter.

Beginning with the spring of 1886, about the time the act creating the Board of Indemnity was passed, and up to the spring of 1887, there was a great deal of litigation growing out of the State's coupons. The tax-payers began to tender coupons and refuse to pay anything else; the State's collectors seized their property and sold it; the tax-payers replied with actions for damages in the Federal court, and without exception they were awarded damages. One of the cases tried is reported in 29th Federal Reporter, 238, and it is printed here. The especial attention of the court is asked to the colloquy between the Circuit Judge and the Attorney-

General of Virginia, at the end of the report. I am authorized by the Circuit Judge to say that the report of the case was submitted to him before it was published and approved of by him.

The report is as follows:

### "WILLIS AND WIFE vs. MILLER, TREASURER, ETC., AND OTHERS.

(Circuit Court E. D. Virginia, October, 1886.)

"1. Constitutional Law—Obligation of Contracts—Virginia Coupons—Virginia act of March 30, 1871, and of March 15, 1884—School Tax.

"The act of the Virginia Legislature of March 30, 1871, commonly called the 'Funding act,' providing that the coupons on bonds issued under that act should be receivable for all public taxes and dues, is not invalided or rendered unconstitutional by the fact that the Legislature subsequently, by the act of March 15, 1884, altered the method of collecting the school tax and the mode of its distribution, and segregated that tax from the gross tax collected.

"2. Same—Virginia act of March 15, 1884.

"So far as the act of the Virginia Legislature of March 15, 1884, forbids the receipt of tax-receivable coupons for any State tax, it is an act impairing the obligation of contracts, and is void under the Constitution of the United States.

"3. Taxation—Virginia Tax-Receivable Coupons—Right of Tax-payer to stand on Tender of Coupons—Virginia Acts of January 14, 1882, and March 15, 1884.

"A tax-payer in Virginia is under no obligation to pay State taxes in money, and to surrender his tax-receivable coupons for identification and verification, as provided by an act of January 14, 1882. He has a right to stand upon the tender of coupons.

"4. Trespass—Tax-collector a Trespasser—Tax-Receivable Coupons—Measure of Damages.

"Upon the tender of tax-receivable coupons by a tax-payer of Virginia for the payment of taxes, whether the coupons are received or not, the taxes are paid, and any levy by a county treasurer upon the property of the tax-payer after such tender is a trespass; and in an action for damages after such levy, where, at the time it was made the officer knew that it was illegal, punitive damages may be recovered.

"5. Same—Joint Trespassers—State Officers advising illegal tax-levy—Virginia act February 24, 1886.

"The members of the 'Virginia Indemnity Board,' created by the act of February 24, 1886 are jointly liable with a county treasurer for a trespass committed by him in making a levy for non-payment of a State tax after tender by the tax-payer of tax-receivable coupons, where they advised such levy, and promised legal assistance and indemnity in the case of the treasurer being mulcted in damages.

"6. Damages—Illegal Levy of Tax—Malice.

"Malice in law is not necessarily personal hate or ill-will of the treasurer towards the person injured, but it is that state of mind which is reckless of law and of the legal rights of the citizen; the object of exemplary damages or smart money, is not only to indemnify the sufferer for any loss sustained, but to prevent similar actions on the part of the trespasser in the future.

"At law—Trespass.

"Prior to the late civil war, the State of Virginia borrowed large sums of money upon her bonds, bearing 6 per cent. interest, to construct works of internal improvement, such as railways and so forth. Her bonds being in the main held outside of her own borders—in the North and in England—she paid no interest on them during the war and during the period of reconstruction. During the war one-third of her territory and population were detached and erected into the State of West Virginia.—*Virginia* vs. *West Virginia*, 11 Wall., 39. In 1871 public attention had come to be attracted to the condition of Virginia's debt, and a general demand arose that some provision should be made to meet it. The people of the State of Virginia took this view of the matter. They said that as West Virginia had taken part in borrowing this money, and received her share of the benefit of it, it was but fair that she should bear her share of the burden of it, and, as that part of the State which had been detached was about one-third in respect to territory and population, it was assumed that her share of the debt, therefore, was one-third.

"Accordingly the State of Virginia, on March 30, 1871, passed an act which offered to all holders of her old bonds, that if they would surrender them to her she would give them her new bonds for two-thirds of the principal and two-thirds of the interest overdue on the old bonds, and on this new bond she could pay them six per cent. interest, and also give them a certificate with respect to the remaining third; that as to it she would turn over to them whatever she might thereafter obtain from West Virginia on account of it. She proposed, further, that the new bonds should run thirty-four years, with interest payable semi-annually, and that the interest promises should be represented by coupons, which should be receivable in payment of all taxes, debts, and demands due the State.

"This proposition proved acceptable to the creditors, and they at once began to fund freely. When new bonds to the amount of $22,000,000 had been issued, bearing these tax-receivable coupons, the Legislature reassembled and repealed the funding act of March 7, 1872, so far as to forbid the further issue of bonds bearing tax-receivable coupons; allowing, however, the funding to continue in all other respects the same. It also passed an act forbidding the collectors of taxes to receive the coupons that had been issued in payment of taxes. The creditors of the State, deeming this to be an act that impaired the obligations of the coupon contract, at once attacked it in the courts; and the Supreme Court of Appeals of the State held it to be unconstitutional and void in the case of *Antoni* vs. *Wright* (22 Gratt., 833). For a number of years after this decision the coupons were regularly received in payment of taxes, but in the meantime a political party was being formed which aimed at destroying the coupons by legislation based upon the decision of the Supreme Court of the United States in the case of *Tennessee* vs. *Sneeds* (96 U. S., 69), by pretending to change the remedy for the enforcement of the contract. This political party came into control of the whole State first in the winter of 1881–'82. It at once proceeded to enact its party policy in the form of statutes. It passed, January 14, 1882, an act which in substance provided that no coupon should be received in payment of taxes except under the conditions prescribed in that act. Reciting that there were many counterfeit, forged, and spurious coupons in existence, (as a matter of fact none had ever been known to exist, and none had ever been found,) it provided that when a tax-payer desired to pay his taxes in coupons he should pay the amount of his tax-bill in money, and surrender his coupons to the collector at the same time, who should deliver them to the County or Corporation Court, where a jury should pass upon the question whether they were genuine or spurious. If the jury found them genuine his money was to be refunded to him.

"The creditors at once attacked this act as one impairing the obligation of their contract. It went to the Supreme Court of the United States, where its validity was maintained. (*Antoni* vs. *Greenhow*, 107 U. S., 769; S. C. 2 Sup. Ct. Rep., 91.) While maintaining the validity of the act as applied to the case where a tax-payer sought to force the State actually to receive his coupons, the court very distinctly intimated that there might be a wide difference between that case and the case in which a tax-payer tendered his coupons and stood upon that tender, and refused to pay in any other medium. Cases built upon this idea were immediately brought before the Supreme Court. A tax-payer offered coupons which were refused. The collector, carrying out the provisions of the State law, levied on the tax-payer's property and sold it. The tax-payer sued him for trespass. He justified his conduct by authority of the State law, which the tax-payer said was unconstitutional and void. The question coming before the Supreme Court of the United States, it held that a tender of the coupons pays the tax so far as to deprive the collector of all power to collect thereafter in another medium, and that any and all acts of the Virginia Legislature were powerless to protect him from the consequences of his trespass in making that levy. (*Poindexter* vs. *Greenhow*, 114 U. S., 270; S. C. 5 Sup. Ct. Rep., 903; *Barry* vs.

*Edmunds*, 116 U. S., 550; S. C. 6 Sup. Ct. Rep., 501; *Taylor* vs. *Chaffin*, 116 U. S., 567-572; S. C. 6 Sup. Ct. Rep., 518; *Royall* vs. *Virginia*, 116 U. S., 572; S. C. 6 Sup. Ct., 510.)

"After the last decision of the United States Supreme Court on this subject it was very evident that the State would be forced to redeem her coupons, unless some new legal barrier could be interposed. The Legislature of Virginia, being in session at the time, determined upon the policy of resistance to the law, as defined by the Supreme Court. Accordingly, on the 24th of February, 1886, it enacted the following statute:

"'Be it enacted by the General Assembly of Virginia, That upon the application of any officer charged with the duty of collecting or settling taxes due the Commonwealth, a board, consisting of the Attorney-General, Secretary of the Commonwealth, Auditor of Public Accounts, Second Auditor, and Treasurer, shall be authorized to ascertain and allow to such officer such sum or sums of money as they may deem just and proper to cover any liability and expenses incurred by, and any loss or damage accrued to, such officer as the result of his collecting, or attempting to collect, enforce or settle taxes due the Commonwealth; and for the amount so ascertained and allowed the Auditor shall draw his warrant in favor of such officer upon the Treasurer, and the same shall be paid out of any money in the treasury not otherwise appropriated. The said board may prescribe rules and regulations in reference to such applications and allowances, if they shall deem proper so to do; but no such allowance shall be made unless the said board shall be satisfied that such officer used due diligence in protecting and defending the interests of the Commonwealth in the matter touching which such allowance is asked for.'

"On the 23d March, 1886, the Auditor of the State, to whom all the collectors of taxes look for instructions, issued a circular to each collector, wherein he instructed them to levy on and seize the property of any tax-payer who should offer to pay his taxes in coupons, and sell it by public auction, and the other members of the Indemnity Board created by the above-recited act indorsed this circular and promised that every collector making these unlawful levies would be indemnified out of the treasury of the State. Fifty-one tax-payers in various parts of the State tendered coupons for their taxes due in the spring of 1886, and refusing to pay anything else, the collectors levied on their property, seized it and sold it. Fifty-one suits were thereupon brought against these collectors and this Board of Indemnity, in the Circuit Court of the United States for the Eastern District of Virginia, for damages for these trespasses. Two of them came on for trial before the Honorable Hugh L. Bond, the United States Circuit Judge, and the Honorable R. W. Hughes, United States District Judge for the Eastern District of Virginia, and a jury at Richmond, in October, 1886.

"The facts in the first case were as follows: Mr. and Mrs. A. M. Willis, of Rappahannock county, Virginia, tendered to W. G. Miller, the treasurer of that county, $128 of the State's coupons in payment of the taxes due upon Mrs. Willis' farm. The treasurer refused to receive them and levied on three horses and a colt, ten head of cattle, eighty-five sheep, a wagon and a buggy—all of which he advertised to sell at the door of the court-house. The levy was very excessive. The horse and colt alone would have brought more than enough to satisfy the tax. On the day of the sale he sold five head of cattle, and returned all the other property to the plaintiffs. The plaintiffs, therefore, sued him for $10,000 damages.

"After the plaintiffs had proved the foregoing state of facts, the defendants, who offered no testimony, moved the court to exclude that part of the plaintiffs' evidence which went to prove that the plaintiffs had endeavored to pay with coupons the portion of their taxes dedicated by the State Constitution to the public free schools. The ground for the motion was as follows: It was argued that the act of Assembly authorizing the issue of tax-receivable coupons was repugnant to the Constitution of the State, and was therefore void, for the reason that the Constitution dedicates one-fourth of the revenue to the establishment and maintenance of the public free schools; that the act makes all taxes payable in coupons, and therefore makes that portion dedicated to the free schools payable in coupons; that it might result from this that the entire revenue might come in in the form of coupons, and thus the public free schools be closed; and they recited in support of this view a decision of the Supreme Court of Appeals rendered in the case of *Greenhow* vs. *Vashon*, in the month of January, 1886, (Law J. Va., May, 1886, p. 299,) wherein that court held the act to be unconstitutional for the reasons advanced.

"The counsel for the plaintiffs replied that the identical question had been passed upon by the Supreme Court of Appeals of Virginia in 1872, in the case before referred to of *Antoni* vs. *Wright*, and that court had then held that the act, in making the school-money payable in coupons, was not repugnant to the Constitution; that it had afterwards reaffirmed the same proposition in the case of *Clarke* vs. *Tyler* (30 Gratt., 134), and *Williamson* vs. *Massey* (33 Gratt., 327); and that the same question has been similarly passed upon by the Supreme Court of the United States in *Hartman* vs. *Greenhow* (102 U. S., 672), and in *Antoni* vs. *Greenhow* (107 U. S., 769; S. C. Sup. Ct. Rep., 91), and that in such cases it was the rule of the Federal judiciary to follow the first decision of the highest court of the State, citing *Gelpoke* vs. *Dubuque* (1 Wall., 175), and the many cases since that case in which the Supreme Court had held to the doctrine of it. (A new set of judges for the Court of Appeals had been put in by the Readjuster party when it came into power in 1881–'82, and it was this latter court that made the decision relied on.) They also cited the cases of *Jefferson Branch Bank* vs. *Skelly* (1 Black, 436), *Northwestern University* vs. *People* (99 U. S., 309), and a number of other decisions of the Supreme Court of the United States for the proposition that where the question was, that whether an alleged contract of a State was repugnant to her own Constitution, the Federal judiciary would pass for themselves on the question without regard to any decision which the courts of that State might have made, he could have no difficulty in coming to the conclusion, as the Court of Appeals of Virginia had done in the first instance, that the act was not repugnant to the Constitution of the State, for that reason or for any other reason.

"The court overruled the defendants' motion to exclude this testimony, and, in so doing, the learned Circuit Judge delivered the following opinion:

"*William L. Royall* and *George Bryan* for plaintiffs.

"*R. A. Ayers*, Attorney-General, and *J. Randolph Tucker* for defendants.

"BOND, J.—The court has listened with interest to the argument of the counsel upon the point now made, that since the act of 1884, which segregated the taxes levied by law and collected by its treasurers, the right to tender coupons in payment of the State school tax was no longer allowable. By the act of 1871 the coupons tendered in the case by the plaintiff in payment of his State taxes were made receivable for all public taxes and dues. The Supreme Court of the United States has decided that this was a contract between the State and the coupon-holder which no subsequent legislation could impair, and we cannot now see why the fact that the Legislature has altered the method of collecting the school tax, or the method of its distribution, or the fact that it has segregated it from the gross tax collected, can alter its contract to receive its own evidences of debt in payment of that tax. It is a public due. The tender of a coupon is the tender of a receipt of so much money already in the State treasury. If the money represented by the coupons is not in the treasury, it is as much the duty of the State to have it there as it is to support the public schools. The one is as much a sacred trust as the other. So far as it may be maintained that the act of 1884 forbids the receipt of tax-receivable coupons for any State tax, to that extent it is in violation of the Constitution of the of United States, as has been decided again and again by the Supreme Court, and no device of division or segregation or distribution of any particular State tax will avoid this fatal defect."

"The Circuit Judge then delivered the following instructions to the jury:

"BOND, J.—If the jury find from the evidence that the plaintiffs in this action, being citizens of Virginia, were indebted to the State in the sum of $128.24 for taxes due upon the property owned by them in Rappahannock county, in that State, and that in payment thereof they tendered to Miller, treasurer of the said county, entitled to receive the same, coupons of the bonds of the State of

Virginia receivable for public taxes, and that said treasurer refused to receive the same in payment thereof, and that notwithstanding such tender the defendant levied upon the property of the plaintiffs, advertised and sold the same, and so collected the tax, then the said Miller was a trespasser and is liable to the said plaintiffs for his trespass.

"And if the jury find from the evidence in the cause that the other defendants to this action, or either of them, advised and counselled the said Miller to commit the trespass above described, by advising him not to receive the said coupons, but to make the said levy, with the promise of indemnification if he was mulcted in damages for his conduct, promising the assistance of counsel to defend him, then the said defendants are jointly liable with the said Miller, the treasurer, for the trespass alleged; and the jury may find such of the defendants guilty or not guilty as they may find they did or did not so advise, counsel and abet the above-mentioned trespass.

"And the jury are instructed that it is the law of the land that upon the tender of the tax receivable coupons for the payment of taxes, whether received or not, the taxes are paid, and any levy upon the property of the tax-payer after such tender is a trespass (any State law to the contrary notwithstanding), for which damages are recoverable; and if the said levy is made with a knowledge at the time that it is illegal, while the tax-payer remonstrates that it is illegal, and claims the protection of the law of the land, then the jury may find that said levy was malicious, and are not confined to giving actual damages, but may give punitive or exemplary damages, as they may find the facts to be.

"And the jury are instructed that the meaning of the word 'malice' in law is not personal hate or ill will of one person towards another, but it refers to that state of mind which is reckless of law and of the legal rights of the citizen in a person's conduct towards that citizen, and the object of the law in permitting the jury to give exemplary damages or smart money in cases like this is not only to indemnify the plaintiffs for the loss sustained, but to prevent similar actions upon the part of these and other defendants in future.

"The court instructs the jury that the plaintiffs are under no obligation to pay their taxes in money and surrender their coupons for identification and verification, but they had a right under the law to stand upon their tender of coupons and to refuse to pay in money and surrender their coupons for identification."

"The jury found a verdict for $150 damages. The counsel for the plaintiffs moved to set aside the verdict upon the ground of inadequacy, but the Circuit Judge overruled the motion, saying that he could not tell how far the jury might have been influenced by the argument respecting the decision of the Virginia Court of Appeals on the school-tax question, which it would have been legitimate for the jury to consider in mitigation of damages."

## "STRICKLER AND WIFE vs. YAGER, TREASURER, ETC., AND OTHERS.

(Circuit Court E. D. Virginia, October, 1886.)

"Constitutional Law—Taxation—Virginia Coupons—Measure of Damages—Malice.

"Following *Willis* vs. *Miller, ante*, 238.

"At Law—Trespass.

"The facts in this case are the same as in the preceding case, with the exception that the tax due was nine dollars only, and there was no question relating to the school tax involved in the case, the plaintiffs having paid that part of the tax relating to the public schools in currency, and having tendered coupons for the other part of the revenue solely.

"The court gave the same instructions in this case as in the preceding one, and the plaintiff's counsel urgently appealed to the jury to find a verdict for punitive damages, and thus arrest these open, proclaimed, and intended defiances of the supreme law of the land, as laid down by the Supreme Court of the United States.

"The plaintiffs had bought in their own property at the sale for nine dollars. Consequently nine dollars was the extent of the damage suffered. The jury found a verdict for nine dollars, the plaintiff's actual damages against the members of the Indemnity Board; but they found a verdict of not guilty as to the treasurer of Page county, who made the seizure and sale. The plaintiff's counsel moved the court to set this verdict aside as inadequate, but his honor, the Circuit Judge, overruled the motion, saying that the amount of damages was a matter entirely within the province of the jury; that it appeared from the two trials which had been had that a jury of Virginians proposed to let it be known that they would not protect their fellow-citizens from wilful trespasses committed upon them, when these fellow-citizens relied upon the constitutional laws of the United States only for that protection; and, if the jury chose to take this position, the court was powerless to secure the citizen any redress.

"During the trial of the latter case, the plaintiff's counsel called the Honorable R. A. Ayers, Attorney-General of the State of Virginia, as a witness to prove that, as a member of the Indemnity Board, he had signed the circular instructing the treasurer to levy and sell, notwithstanding the tender of coupons, and promising them indemnity for such unlawful acts. During his examination the following colloquy took place between him and the court:

"*William L. Royall* and *George Bryan* for plaintiffs.

"*R. A. Ayers*, Attorney-General, and *J. Randolph Tucker* for defendants.

"Bond, J.: Mr. Attorney-General, when you signed that circular and that guaranty, did you know that the Supreme Court of the United States had decided that it was a trespass for a collector to levy on a tax-payer after a tender of coupons, and that any law of the State undertaking to protect him on that trespass was repugnant to the Constitution of the United States and void?

"Ayers, Attorney-General: After the last decisions of the Supreme Court of the United States, made in the beginning of February last, I was before the legislative committee having charge of that subject. The meaning of those decisions was fully explained to and understood by that committee and entire Legislature. This act creating the Indemnity Board was the result of the resolution the Legislature came to.

Bond, J.: Do you think that indemnifying act a constitutional one, or that any act authorizing one citizen to commit a trespass upon another, and agreeing to indemnify him for all damages he might suffer, would be held to be constitutional by the courts of Virginia?

"Ayers, Attorney-General: Well, I think there might be a good deal of discussion concerning that.

"Bond, J.: Well, we won't discuss it."

Matters had got to such a point by the winter of 1886–'7 that it was evident the State would have to make some provision for the coupons or enact further legislation to kill them off. Accordingly, all the wise men in the State put their heads together and devised the act of May 12, 1887. The *projet* being formulated, the Governor called the Legislature together in the winter of 1886–'7, recommending to it that this *projet* should be enacted into a statute, which was done just as he recommended it. The following is his message to the Legislature:

"COMMONWEALTH OF VIRGINIA,
"GOVERNOR'S OFFICE, *Richmond*, March 16, 1887.

"*To the General Assembly:*

"An earnest desire to promote the public welfare has decided me to exercise the constitutional authority conferred upon the Executive, and convene the General Assembly to meet in extra session to-day.

"In sending this message to your honorable bodies, it is my purpose—

"First. To call your attention to the present condition of the debt of the Commonwealth, and to the very recent decisions of the Supreme Court of the United States in reference to the law imposing tax upon sample-merchants.

"Second. To ask that you receive, and, if proper, adopt the work of the revisers of the Code.

"Third. To request that you make proper provision for the comfortable maintenance of the insane, who are now confined in jails because of insufficient accommodations at the regular asylums erected for that purpose. I also express the hope that, if possible, you will legislate on such other subjects as in your judgment the public interests may require.

"Every attempt to effect a final settlement of the debt question by the Legislature has always been encompassed with embarrassments. The act passed in 1871, known as the funding bill, was thrown aside by the people at the first opportunity afforded them to do so. It attempted to bind the State for the payment of more than five million dollars of war interest, and to appropriate for the claims of creditors funds inviolably appropriated to the cause of education by the Constitution, which was adopted long anterior to the passage of said bill. A subsequent measure, the settlement of 1879, known as the 'McCullough bill,' based upon the former settlement, was thought by many to be within the ability of the State to carry out without increase of taxation, because of certain concessions by the creditors; but this, too, received at the polls the condemnation ot a majority of the voters, and its advocates for the Legislature in most of the counties, and its supporters who were candidates for the governorship and other State offices, were defeated.

"After a long and bitter agitation of the question, the act approved February 14, 1882, became a law on the demand of the party which assumed the reins of government in consequence of their advocacy of it. All attempts by their political opponents to make other settlement with the creditors, carrying a greater amount of principal and interest, having failed, a pledge was finally given by them not to disturb or repeal the settlement thus decreed by a majority of the voters and the public approval of the sentiment of that settlement, as it stands to-day, has received no public disapproval, either by conventions of political parties or by legislatures; so that it may be said that the people, without reference to party distinction, are of one mind in their resolution to uphold and maintain it in all its integrity and by all lawful means.

"In a former message I had the honor to address to the General Assembly, I called attention to the fact that Virginia had been for four years the battle-ground for contending hosts; that her soil had been exhausted to supply armies; that houses, barns, farming implements, and fences had been destroyed; that her industries had been paralyzed; that the wheels of her commerce had been stopped; that the fires in her furnaces had been extinguished; that her sons had fallen beneath shot and shell, or had been enfeebled by exposure and disease; that her capital city had been swept by fire, and her boundaries changed so as to show two States where only one had previous existence; and that her citizens, in returning to their avocations after the war, in most instances had to begin their business lives over again, for though the land was before them, it was confronted with a change in the labor system, while stock of all kinds had to be provided. It is easy, therefore, to perceive that the condition of the State was far different from the one she occupied when the debt was contracted. It appears, too, that the settlement of 1871, which gave birth to the coupon, involved a larger amount of indebtedness than was within the ability of the State, under all these circumstances, to pay. The platform of the party now in power in the State promised an acceptance of the settlement of 1881–'82, which had then been declared constitutional by the courts, both State and Federal, and to cease all further agitation of the question or any disturbance of that settlement by repeal or otherwise. It was only after the sudden reversal of its own decision by the Supreme Court of the United States that further legislation was necessary for the protection of the interests of the State.

"From statements carefully prepared by the Auditors, it appears that the annual revenues for some years to come will not exceed $2,700,000, and that if the outstanding obligations of the State should be funded into bonds under the Riddleberger bill, except those held by institutions of learning, the interest to be paid, added to the necessary annual expenses, would about absorb this income. The inability of the State to make a settlement now with a greater amount of principal and interest than the Riddleberger act, whatever she might have done once, arises from an increase in her annual expenses—such as maintaining two additional lunatic asylums, one for the white and one for the colored; the maintenance of a normal and collegiate institute for our colored people, and a school for the education of our female teachers; aid to the Confederate Home for our poor and disabled soldiers, over whose shoulders rests no mantle of governmental protection; assistance to citizens of the State who have lost a limb, or an eye, or who have been seriously disabled by wounds, so as to prevent them from performing manual labor, and whose wounds grow more burdensome with the increase of years; the increased expenses of our criminal charges since the abolition of the whipping-post; and the increased appropriations to our public schools. These are some of the necessary obligations incurred, while in the same period the State taxes have been reduced from fifty to forty cents on the one hundred dollars.

"Accompanying this is an estimate in detail of the annual expenses of the government, to which I respectfully call your attention, so that you may see that if, to the gross amount given, is added the amount of interest which the Riddleberger bonds carry, the present revenue of the State will be absorbed. There are two methods only by which she can pay a greater amount of interest than this settlement calls for—namely, a reduction of the present expenses or an increase of the present revenues.

"The laws enacted on this subject by the Legislature would have been ample to secure the collection of the taxes, and to regulate the reception of such coupons as might have been offered, but they became in a measure inoperative under the decisions of the Supreme Court of the United States in *Poindexter* vs. *Greenhow* and *Barry* vs. *Edmunds*, and suits to recover damages against the officers were maintained in the Circuit Court of the United States. The Attorney-General finally declined to advise the collecting officers to continue to execute the law, and while some of them have declined to longer do so, others, without positively refusing, have taken no further action in the matter of levying on persons who have tendered coupons in payment of their taxes, and who refused to surrender them for identification and verification, as prescribed by the act of January 14, 1882. It may be said that it was clearly shown that juries would not grant, in the cases brought before the Circuit Court of the United States, punitive or excessive damages, but actual damages only, and that an Indemnity Board had been created for the purpose of preventing any loss to the collecting officers by said decisions. Neither was it held that the bondsmen of the collectors are in any way liable; for, under the peculiarities of the decision, it had been announced that a *State officer carrying out the law of the State* is not a *State officer*, but an *individual trespasser*, and it follows that his bondsmen are not liable for damages, except for his acts as an officer of the State. As soon as this state of things became manifest, more persons tendered coupons for their taxes and licenses than before, showing that the law passed to obstruct the flow of coupons into the treasury had been up to that time effective. By returns lately made to the Auditor of Public Accounts, from July 1st to December 1st, 1886, it appears that in fifty-five counties and twelve cities of the Commonwealth upwards of three thousand persons have tendered coupons for their taxes and licenses, to the amount of $105,258.11.

"The Executive has been powerless to execute the law, because no authority was vested in him to remove the collectors who declined to carry out the instructions of the Legislature, and to substitute for them others who would, until the people could remedy the matter by election. In this aspect of affairs, the cash revenue must depend upon the voluntary contributions of the people, many of whom will be justly aggrieved by the fact that some persons are permitted to pay their taxes in coupons at half price or less, whilst others and poorer citizens are forced to pay theirs in cash.

"The coupons past due and unpaid on the 1st of January, 1888, if not put in the hands of the people, will amount to $4,935 016.50. Up to the period of this attitude taken by certain treasurers there had been a marked decrease in the amount of coupons forced into the treasury—being for the year 1885–'6 an average of $53,000, as against $173,000 for 1884. The sum of past-due coupons forced into the treasury in all suits against the State, to be relieved by the Indemnity Board, had been only $35,500, whilst $3,600,000 of coupons then past-due and unpaid had been stopped, and the cost of keeping this large amount out of the treasury had been only $7,977.42, or about one-fourth of one per cent. We should not, however, forget here in Virginia that though the decision of the Supreme Court, which stripped Virginia of her sovereignty guaranteed by the Eleventh Amendment to the Constitution, was made by a majority of one in a court of nine judges, and that a member of that court did not hesitate to say, with the concurrence of three others, including the Chief-Justice, that it was the first time, since the Eleventh Amendment was adopted, in which a State had been coerced by judicial proceedings at the instance of individuals in a general court, and in his opinion none of these suits could be maintained, for the reason they are in sum and substance and effect suits against the State of Virginia; yet it had all the binding effect and force of a decision unanimously concurred in by a full court, and by the Constitution it is the supreme law of the land, and, if necessary, must be supported by the President with the strong hand of Federal power. Nor do I see how the prohibition of the Federal Constitution, that no State shall pass any law impairing the obligation of a contract, can be evaded by engrafting a nullifying provision upon the Constitution of the State. This prohibition is upon the State, without regard to the form its laws may take or the agencies which enact them. The obligation of a contract can no more be impaired by the Constitution of a State than by an act of its Legislature. Indeed, the point has been settled by the Supreme Court of the United States more than once—the very language of one of its decisions being, that 'It is well settled, by the adjudications of this court, that a State can no more impair the obligation of a contract by adopting a Constitution than by passing a law; in the eye of the constitutional inhibition they are substantially the same thing.'

"In view of these facts, I think it wise to recommend a substitute for the existing laws, so far as they refer to levying for taxes for which coupons have been tendered. The theory of the act approved February 14, 1882, is that the tax-receivable coupons must be proven to be genuine before they can be received, and this is held not to be an unreasonable requirement.—*Antoni* vs. *Greenhow.* Under this proceeding the tax-payer had to make an initiative tender of coupons for the taxes, and then file his petition, prove his coupons, and recover the money from the treasurer. But in *Poindexter* vs. *Greenhow* it was held that the tender of *genuine* coupons was payment, and that the collecting officer, if he subsequently levies, is a trespasser and liable for damages. The tax-payer can stand on his tender and await the action of the officer, and if he goes further can subject him to the cost and annoyance of a suit in the Federal courts.

"Let us change the position, and let the Commonwealth take the initiative. This can be done by instituting suit to recover the taxes, and giving the tax-payer a day in court to prove his coupons to be genuine and make good his tender. He should not object, for in making the tender he assumes the responsibility of the genuineness of the coupons, and this affords him an opportunity of proving it.*

"I therefore have the honor to recommend the passage of an act providing that all taxes, *including taxes on licenses* now due or which may become due hereafter to the Commonwealth, in payment of which any paper or instrument purporting to be a coupon detached from a bond of this State shall have been or may hereafter be tendered and not accepted as payment, and not otherwise paid, may be recovered in the Circuit Court having jurisdiction over the county or corporation in which said taxes shall have been assessed; or if the tender was made to the Auditor of Public Accounts, in payment of taxes which he is authorized by law to receive, the said taxes may be recovered in the Circuit Court of the city of Richmond, the court to have jurisdiction without regard to the amount of taxes claimed, and though the amount be less than twenty dollars. And if the defendant fails in his defence, and the taxes claimed are found to be due the State, there shall be judgment for the Commonwealth for the aggregate amount of the taxes due to the State thereon, from the time they became due until the date of judgment, with interest on the said aggregate amount from the date of the judgment until the payment, and costs. Every such judgment shall be docketed as prescribed by law in other cases. The Auditor of Public Accounts only shall be authorized to receive payment of any such judgment, and no execution shall issue thereon until he directs it.

"The passage of the substance of a law such as I have outlined, with the attending machinery to put it in motion, will be carrying out the plain theory of the act approved February 14, 1882, and it is hoped will prove effective."

The salient points of the act were that whoever tendered coupons for his taxes and refused to pay anything else should be sued in the State court for the taxes. If he pleaded the tender he should be required to prove the coupon genuine (there being the bond act and expert-evidence act in existence, which made it impossible to him to prove them if they were enforced, and her highest court had decided that both were valid and constitutional acts). If he failed in his defence, as he must necessarily do, judgment was to go against him for the principal of his tax, with five per cent. penalty added,

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*The Governor wholly overlooks the distinction between standing on a tender and endeavoring to force the State to receive the coupon. What he claims the tax payer may rightfully be required to do is what this court held he might be required to do when suing the State. But in *Chaffin* vs. *Taylor*, 116 U. S., p. 567, it expressly held that he could not be required to do this when standing on his tender.—W. L. R.

interest on the tax to the date of judgment, interest on the whole from that time till paid, with about sixteen dollars of costs in each case. Execution was to issue on the judgment, and if coupons were tendered in payment of the execution, the officer was not to levy it, but he was to make return of the fact, when another suit was to be brought on his judgment, and another judgment to be entered on it, with the addition of sixteen dollars more of costs. If coupons were tendered in payment of the execution on this second judgment, there was to be a third suit, with sixteen dollars of costs added again; and so on *ad infinitum.*

The act had two plain purposes. The first was to withdraw the protective litigation, which the tax-payer resorted to to defend himself in his right to use coupons, from the Federal court, where it would be fair and impartial, to the State courts, where it was believed the State's judges would administer the law in whatever way was necessary to accomplish the State's end, without regard to the tax-payer's constitutional rights The second was, by piling sets of costs upon sets of costs, to make the burden so great after awhile that the tax-payer would be compelled to yield, and all others would be deterred in the future from attempting to use coupons.

The act is as follows:

"CHAP. 185.—An act to provide for the recovery by motion of taxes and certain debts due the Commonwealth, for the payment of which papers purporting to be genuine coupons of the Commonwealth have been tendered.

Approved May 12, 1887.

"1. Be it enacted by the General Assembly of Virginia, That all taxes, including taxes on licenses now due or which may hereafter become due to the Commonwealth, in payment of which any paper or instrument purporting to be a coupon detached from a bond of this State shall have been or may hereafter be tendered and not accepted as payment, and not otherwise paid, may be recovered in the Circuit Court having jurisdiction over the county or corporation in which said taxes shall have been assessed; or if the tender was made to the Auditor of Public Accounts in payment of taxes which he is authorized by law to receive, the said taxes may be recovered in the Circuit Court of the city of Richmond.

"2. The court shall have jurisdiction without regard to the amount of the taxes claimed, and though the amount be less than twenty dollars.

"3. The proceeding shall be by motion, in the name of the Commonwealth, on ten days' notice, and shall be instituted and prosecuted by the attorney for the Commonwealth for the county or corporation in which the proceeding is; or if it be instituted by direction of the Auditor of Public Accounts, in the Circuit Court of the city of Richmond.

"4. The notice may be served in any county or corporation in the State, in the mode prescribed by the first section of chapter one hundred and sixty-four of the Code (edition of eighteen hundred and seventy-three); or it may be served on any agent of the defendant in the county or corporation in which the proceeding is, and the word 'agent,' as here used, shall include any person who shall have made the tender aforesaid on behalf of the defendant; or if there be no known agent of the defendant in the said county or corporation, it may be served by publishing the same one time in some newspaper printed in the county or city where the tax was assessed; or if there be no paper printed in such county or city, then in some newspaper published in some county or city nearest to the county or city where such tax was assessed.

"5. The motion may be tried or heard by the court or jury as motions in other civil cases. If the defendant relies on a tender of coupons as payment of the taxes claimed, he shall plead the same specifically and in writing, and file with the plea the coupons averred therein to have been tendered, and the clerk shall carefully preserve them. Upon such plea filed, the burden of proving the tender and the genuineness of the coupon shall be on the defendant. If the tender and the genuineness of the coupon be established, judgment shall be for the defendant on the plea of tender. In such case the clerk shall write the word 'proved,' and thereunder his name, in his official character across the face of the coupons, and transmit them, together with a certificate of the court that they have been proven in the case, to the Auditor of Public Accounts, who shall deliver the coupons to the Second Auditor, receiving therefor the check of the Second Auditor upon the Treasurer, which check he shall pay into the treasury to the credit of the proper tax account.

"6. If the defendant fails in his defence, and the taxes claimed are found to be due the State, any coupons filed by him with a plea of tender (and not spurious) shall be returned to him, and there shall be judgment for the Commonwealth for the aggregate amount of the taxes due, and the interest thereon from the time they became due till the date of the judgment, with interest on the said aggregate amount from the date of the judgment until payment and costs.

"7. No antecedent lien of the Commonwealth for the taxes for which any judgment is rendered shall be deemed to be merged in the judgment, or otherwise impaired by the recovery of the same, but such lien shall continue in force notwithstanding the judgment.

"8. Every such judgment shall be docketed as prescribed by law in other cases, and the clerk shall issue execution thereon, directed to the sheriff of any county (or sergeant of any city), who shall account for the money collected thereon to the Auditor of Public Accounts.

"9. Should coupons be tendered the officer in satisfaction of said execution, he shall note the fact of such tender upon the execution and return it to the clerk's office, and thereupon the Auditor of Public Accounts may direct an action to be brought upon the judgment. This action shall be instituted and prosecuted in the mode hereinbefore prescribed for actions to recover judgments for taxes, and similar actions may be instituted whenever coupons are tendered in satisfaction of any judgment obtained by the Commonwealth under provisions of this act.

"10. The clerk of the court in which any such judgment is rendered in behalf of the Commonwealth shall, as soon as it is rendered, transmit a certified abstract thereof to the Auditor of Public Accounts, who shall record the same in a book to be kept for that purpose.

"11. Immediately after the passage of this act the county and city treasurers, and all other officers authorized by law to collect or receive money for taxes due the Commonwealth, including license-taxes, shall report to the Commonwealth's attorney of their respective counties and cities, and also to the Auditor of Public Accounts, the names of all persons assessed or liable therein for taxes due the Commonwealth who have heretofore tendered (otherwise than for identification and verification) coupons for such taxes, and which taxes remain unpaid, the amount of the taxes due, on what account and when they become payable, and a description, as far as possible, of the coupons tendered, and when tendered; and they shall thereafter make like reports whenever and as soon as any such tender may be made. As soon as the Auditor of Public Accounts shall receive such reports he shall credit the proper officer with the taxes named therein for which coupons were tendered.

"12. The attorneys for the Commonwealth, and the Attorney-General, when it is his duty under this act to represent the Commonwealth in any case in the Circuit Court in the city of Richmond, upon such report being made to them, or whenever they are otherwise informed of any such tender having been made, shall forthwith institute and prosecute such proceedings as are hereinbefore required.

"13. In any case instituted under the provisions of this act in which there is a judgment for the Commonwealth, a fee of ten dollars shall be allowed to the attorney for the Commonwealth, or the Attorney-General, as the case may be, which fee, and the fees of the clerk and other officers for services rendered in the case, as well as such other costs as are allowed by law, whenever cases in which the Commonwealth is a party, shall be taxed in the costs against the defendant. The Commonwealth shall not be liable for any fees or costs in any proceeding under this act.

"14. If any officer fails to perform any duty required of him by this act, he shall be fined not less than one hundred dollars nor more than five hundred dollars.

"15. This act shall be in force from its passage."

In the spring of 1885, when the State's Legislature had gone no further than to the point reached then, this court said, in speaking of it (*Poindexter* vs. *Greenhow*, 114 U. S. R., at 304, *et seq.*):

"The acts of Assembly in question must be taken together, as one is but an amendment to the other. The scheme of the whole is indivisible. It cannot be separated into parts. It must stand or fall together. The substantive part of it, which forbids the tax-collector to receive coupons in payment of taxes, as we have already declared, as, indeed, on all sides is admitted, cannot stand, because it is not consistent with the Constitution. That which is merely auxiliary to the main design must also fall with the principal, of which it is merely an incident; and it follows that the acts in question are not laws of Virginia. * * * * * *

"Indeed, it is quite manifest, from the face of the laws themselves, that they are together but parts of a larger whole. By an act of the General Assembly of Virginia, passed February 14, 1882, the Legislature re-stated the account between the State and its creditors on a basis of readjustment which reduced it to the sum of $21,035,377.15, including interest in arrears to July 1, 1882, which was thereby declared to be her equitable share of the debt of the old and entire State, and on which it was also declared that the State was not able to pay interest for the future at a larger rate than three per cent. per annum. The outstanding debt, of which this was a reduction, was then classified, and bonds of the State were authorized to be issued, bearing interest at the rate of three per cent. per annum, in exchange for outstanding bonds of the different classes, scaled at rates of fifty-three per cent., sixty per cent., sixty-nine per cent., sixty-three per cent., and, as to one class, as high as eighty per cent., which were to be retired and cancelled. The coupons on the new bonds were not made receivable in payment of taxes. To coerce creditors holding bonds issued under the act of March 30, 1871, to exchange them for these new bonds, at these reduced rates, and with them to give up their security for the payment of interest, arising out of the receivability of coupons in payment of taxes, is the evident purpose of the acts of January 26, 1882, and of March 13, 1884, and all together form a simple scheme, the undisguised object of which is to enable the State to rid itself of a considerable portion of its public debt, and to place the remainder on terms to suit its own convenience, without regard to the obligations it owes to its creditors.

> "The whole legislation, in all its parts, as to creditors affected by it and not consenting to it, must be pronounced null and void."

This Appendix has been written to very little purpose if these facts have not been made to appear:

First. That the government of Virginia deliberately embarked, in 1882, in the scheme of forcing those who held her bonds bearing tax-receivable coupons to surrender them and take others for about half the amount of principal, bearing half the original rate of interest, and without any security for that interest. That "Coupon-Killer No. 2" became a dead letter, but "Coupon-Killer No. 1" unexpectedly proved an available remedy to the coupon-holders, and that therefore the Legislature passed every act which its ingenuity could devise to emasculate it as a remedy, the same being the act to require a heavy license-tax for selling coupons; the act requiring the special license-tax for a lawyer to bring a suit under it; the act requiring an appeal in every case, whether there was reason for it or not; the act requiring the bond to be produced; the act forbidding the use of expert evidence; the act providing for barratry; and the act providing for champerty.

Second. That, from the time it was demonstrated that *Antoni* vs. *Greenhow* (107 U. S. R.) had not settled this controversy, as the Virginia statesmen erroneously believed, but, on the contrary, that it had left the real controversy entirely untouched, the Legislature had enacted three sets of statutes, each set being intended to meet the emergency as each successive decision caused one, as will appear by a brief retrospect.

As soon as it could, after United States Circuit Judge Bond laid down, in May, 1883, the fundamental proposition, the Legislature in the spring of 1884 passed its joint resolutions and its act for charging coupons against principal. At the same time it passed the act charging $1,000 and twenty per cent. of the face of the coupon for the privilege of selling coupons. At the same time it charged the lawyer $250 who should bring a suit under "Coupon-Killer No. 1." At the same time it provided for appeals in all cases. At the same time it forbade actions against officers who should levy after a tender of coupons, injunctions to forbid him to sell being already forbidden by "Coupon-Killer No. 2." This legislation was all that was thought necessary at that time, because it guarded the State perfectly so long as litigation was confined to her courts, and it was not then believed possible for any but tax-payers owing $500 to have their litigation in the Federal court, and the State cared nothing for the few persons who paid $500 and upwards.

The next stage came when this court decided *Barry* vs. *Edmunds* (116 U. S. R.) and *Royall* vs. *Virginia* (*ib*). These cases established that the smallest tax-payer could hold the State's officer who molested him to account in the Federal court, and that the license tax-payer had all the privileges and exemptions that the property tax-payer had. Meantime such use had been made of "Coupon-Killer No. 1" that the State saw it was necessary to emasculate it still further. Accordingly, the decisions having been made in the spring of 1886, the Legislature at once passed a series of acts aimed at meeting the new emergency. To cripple "Coupon-Killer No. 1" still further, it provided that the bond from which the coupon came should be produced in order to prove the coupon, and to prevent other proof being used it passed the act forbidding resort to the testimony of experts. To drive lawyers from giving aid to tax-payers it made those who did give them aid barrators, and it made those who gave them advice champertors. To coerce tax-payers out of standing on a tender of coupons and refusing to pay anything else, it created the Board of Indemnity, and authorized it to indemnify all officers who would trespass on tax-payers attempting to use coupons. These measures were thought sufficient for the emergency as it then existed.

But by the winter of 1886–'7, it had become evident that all the legislation together was not sufficient to suppress the coupon, and the act of May 12, 1887, was the final act, which it was believed would give the *coup de grace*. It is, therefore, very plain that all this legislation is part of one series, and that the purpose of that series is to destroy the coupon.

# APPENDIX B.

## McGAHEY vs. VIRGINIA.

This Appendix to the brief of William L. Royall, for plaintiff in error, contains the papers upon which the motion to advance this case and the others heard with it was made. Copies of the papers were served, before the motion to advance was made, upon the Attorney-General of Virginia, as the records of the court will show, and he appeared and filed a printed answer, which does not deny a single statement of fact contained in the motion to advance, as the records of the court will show.

The second paper is an extract from the Richmond *Dispatch* of April 10, 1889, giving an account of what took place in the Circuit Court of the city of Richmond, Virginia, when a motion was made under the act of May 12, 1887, to enter second judgments in five hundred cases where first judgments had been entered.

Of course these papers are not printed here with any view to influencing the judgment of the court upon any of the issues of law presented in the records submitted. I print them as making complete the history of the period, as contained in Appendix A, and as part of what is necessary to developing to the court the conspiracy that has long been in progress in the State of Virginia to defeat the guarantees of the Constitution of the United States, as they apply to the State's coupons, and, as thereby affecting directly the charge which I make in the cases of Cooper and Bryan, that the judge who tried the case purposely put his rulings on principles of the common law instead of statutes of the State, in the hope that they were thereby placed beyond the review of this court.

They further show that the case of *Ellett* vs. *The State* is one of very great practical importance. Through these fraud-

**ulent proceedings the State has loaded her citizens most iniquitously with an enormous burden of costs, and, if she may continue in this, she can undoubtedly evade her coupon contract by making the costs of an action to be paid in money equal to what she is made liable for on her coupons.**

**The following are the papers on the motion to advance:**

## SUPREME COURT OF THE UNITED STATES.

Motion to advance *McGahey* vs. *The State*, No. 1460; *Cooper* vs. *The State*, No. 1459; *Bryan* vs. *The State*, No. 1458; and *Ellett* vs. *The State*, No. 1461; and have them heard with *Vashon* vs. *Greenhow*, No. 223, which will soon be reached.

All of these cases are *in pari materia* and part of the unfinished controversy in progress between the tax-payers of the State of Virginia and those of her officers who are seeking to deprive them of their lawful rights under color of unconstitutional and void acts of the Virginia Legislature. They are all really parts of the case of *Poindexter* vs. *Greenhow*, 114 U. S., 220, and therefore, under the practice of the court, entitled to be heard as soon as they come here, as bringing to a final conclusion what has already been adjudged by the court.

The case of *Vashon* vs. *Greenhow*, which will be reached very soon, is this: The Constitution of the State of Virginia appropriates one-fourth of the tax collected from real and personal estate for the public free schools. This Constitution was in force and effect when she enacted her act of 1871, providing for funding her public debt, with coupons attached to the new bonds receivable in payment of all taxes and demands due the State. When the controversy over the validity of this statute began, it was insisted by the State's representative that the funding act was repugnant to the Constitution of the State in making this school-tax payable in coupons, as thereby the public free schools might be left destitute of money. This contention was made by the State's representatives in the first case that came to judicial decision, and was pronounced against by her own highest judicial tribunal in the case of *Antoni* vs. *Wright*, 22 Gratt., at pages 833–874.

Not satisfied with this decision, the State's representatives again brought this question to judicial determination, and again the same court decided against her claim in *Williamson* vs. *Massey*, 33 Gratt., 237–246.

In 1881 there was a political revolution in the State, which brought a party into power whose proclaimed object was to destroy the tax-receivable coupons. In that year the term of office of each one of the judges of her Supreme Court of Appeals terminated, and the Legislature elected five entirely new judges in the place of the old ones. The question coming again before this new court, it held the funding act void, as being in contravention of that provision of the State Constitution appropriating part of the State revenue to the free schools. A writ of error was taken out from this court to this judgment, upon the ground that it gave effect to a law impairing the obligation of the State's contract, and this is *Vashon* vs. *Greenhow*, No. 223.

In the cases of *McGahey* vs. *The State*, No. 460; *Cooper* vs. *The State*, No. 1459; and *Bryan* vs. *The State*, No. 1458; the same questions presented in one are presented in all.

The act of Assembly authorizing the issue of the bonds with tax-receivable coupons attached provides that the bonds must be signed by the Treasurer and Second Auditor, but that the coupons may be printed from an engraved plate simply, and not signed by any one. So much of it as is necessary to understand the matter is here printed.

After providing for the character of the bonds and coupons, and that the coupons shall be receivable for taxes, the act goes on to provide:

"The Treasurer is hereby authorized and directed to forthwith cause to be prepared, engraved or lithographed, registered bonds, with coupons and certificates of the character mentioned in the second and third sections of this act, and when prepared shall commence the issuance of the same as herein provided. The bonds and certificates shall be signed by the Treasurer and countersigned by the Second Auditor; the coupons shall be signed by the Treasurer, or a *fac-simile* of his signature shall be stamped or engraved thereon."—Acts of 1870-'1, p. 379, sec. 4.

As a matter of fact, the coupons were all issued as engraved paper simply, without the signature of any one being attached.

In January, 1886, the State enacted two statutes, which have since been consolidated and now form section 412 of the Code of 1887. It reads as follows:

"Where any paper purporting to be a coupon cut from a bond of the State is offered in evidence in any case, the burden of showing its genuineness shall be on the party offering it. If the paper be printed, engraved or lithographed, expert testimony shall not be received to established such genuineness. At the hearing, or on the trial of the issue, the party contesting the genuineness of such coupon may call for the production of the bond from which the coupon was detached, and the plaintiff shall be required to produce the bond as a condition precedent to his right of recovery."

After the decision of the court in *Poindexter* vs. *Geeenhow*, many tax-payers in Virginia purchased her coupons detached from the bonds and tendered them in payment of their taxes, and, the same being refused, they stood on their tender, refusing to pay anything else.

On May 11, 1887, the Legislature of Virginia enacted a statute which was considered by this court in *Ex parte* Ayers, 123 U. S., which directed the Commonwealth's attorney in each county and city to institute a suit, in the name of the State, against all persons standing on a tender of coupons for taxes, in the Circuit Court of the State for his county or city. If the defendant pleaded a tender of coupons, the burden of proving that tender was placed on him, and it was provided that if he failed in his defence he should pay a penalty of five per cent., compounded interest, and the costs, including a fee of ten dollars to the Commonwealth's attorney.

Under this statute more than two thousand suits were brought. (See affidavit of William L. Royall, hereto attached.)

The first cases that came on for trial were in the Circuit Court of the city of Richmond. The judge ruled that if the defendant did not produce the bonds from which his coupons came he should not be allowed to introduce any evidence whatever to prove them genuine. As all, or almost all, of the defendants had bought their coupons in the open market, detached from the bonds, in good faith, as and for the coupons of the State of Virginia, and as they had no knowledge whatever of the locality of the owner of the bonds, and had no means of exercising any control over them if he lived without the jurisdiction, in almost every case they were unable to produce the bonds, and verdicts and judgments went against them as of course.

At the spring term, 1888, the Circuit Court of the city of Richmond entered up 367 judgments against persons who had tendered coupons for their taxes. (See certificate of the clerk, hereto annexed.)

The laws of Virginia require a penalty of five per cent. to be added to all taxes, unless they are paid by December 1st of the year when they become due; and the aforesaid act of May 11, 1887, provides that when judgments are rendered under it they shall be for the principal, this penalty, and interest from said December 1st to the time of judgment, and interest upon the aggregate of this sum from that time forward.

Nicholas Neurohr was one of the parties sued in the Circuit Court of the city of Richmond. His tax was $1.80. He pleaded that he had tendered the State's coupons, but as he was unable to produce the bond, a verdict and judgment was entered against him. When execution issued the claim had swollen to $18.93.

The said act of May 11, 1887, provides further that when execution goes out on the judgment, if coupons are tendered in payment of it the sheriff shall refuse to take them, and report to the court the fact that coupons were tendered; whereupon there shall be a second suit on this judgment, and if a new judgment is entered it shall carry with it another equal instalment of costs.

In all the courts of the State where suits have been brought, with the exception of Norfolk and Petersburg, the ruling of the Judge of the Circuit Court of Richmond has been followed, and judgments have been entered for the State. In all of them second suits have been brought, or are about to be brought, coupons having been tendered for the executions; and second judgments, with a second set of costs, have been entered in many, and will, as a matter of course, be entered in all.

The case of *Ellett* vs. *The State*, No. 1481, one of those now moved to be advanced, is a case in which a second judgment with costs was entered, as the court will see by inspecting the record. That case presents the single question whether these costs, being due to the State, can be paid in coupons.

The substance of the whole matter is, that the State, in pursuing her policy of attempting to destroy her coupons, has provided for suing all those who use them, in her own courts, where she directs that they shall be deprived of all defence, and her judges, without exception, are carrying out her commands. Failing to coerce the tax-payer by one judgment, she then directs that he shall have successive judgments, with costs piled on him, until he is coerced into abandoning his tender or has a mountain of debt piled on him that will ruin him, and her judges are carrying this out also.

The records of the four cases now moved to be advanced, which are printed, together with the certificates and affidavits attached to these motion papers, prove all that has been herein stated. The cases, which are test cases, present exceptions to the very rulings described. Writs of error were taken out in them from the Supreme Court of Appeals of the State, when all the rulings were affirmed on the 6th day of December, 1888. Application was at once made to one of the Justices of this court for writs of error to these judgments, and he allowed them. The writs and citations, in conformity to the rules of this court, are returnable to the second Monday of October, 1889, and it is, of course, a very serious question whether the court has the power to order a hearing before that day, when the defendant in error does not consent. So far as I know, the question has never been passed on by the court. But it seems to me that in the nature of things the court must have some sort of control over them as soon as they are put upon its docket, and they were docketed as soon as the transcripts of the records were filed and the clerk's fees secured to him.

It is the settled practice of the court that no citation is necessary where an appeal is taken from a final decree at the same term at which it was entered, and the law provides that the same rules, regulations and restrictions shall prevail in appeals from final decrees as in writs of error. I am informed that it is the practice of the court to treat all such appeals as being on the docket for all purposes from the moment the transcript is filed and the clerk's fees are secured. If this be so, how can it be, save by the court exercising control over a case from the time it is docketed? If a citation had been issued, it would have been to the first day of the next term; yet, a citation in that particular case being omitted, the court controls the case from the moment it comes here. Indeed, it would seem clear that the statute allows the court to make its own rules governing writs of error, so that the defendant in error have thirty days' notice. Accordingly, the court provided by Rule 32 that writs of error under section 5 of the act of March 3, 1875, should be returnable thirty days after date. So that the requirement of Rule 8, that writs of error generally shall be returnable on the first day of the next term, is now a requirement of the rule only, and not of statute, and therefore may be modified by the court, as it considers that the interests of justice or convenience demand.

If all of the cases in which the State of Virginia is suing her tax-payers who stand upon their tender of coupons are to be brought to this court, it will involve an amount of litigation that would utterly obstruct the business of this court. But this, of course, is a matter that addresses itself entirely to the court. It is not for the plaintiffs in error to urge it as a reason for advancing their cases. It is to be assumed, however, that where so many persons are sued, one general attorney employed to defend all can control only a small proportion of them, and that the individuals will insist upon asserting their constitutional rights, even if he were disposed to advise them to abandon the matter, which he is not at all disposed to advise them to do. If half of them, acting independently, should determine to bring their cases to this court, a blockade of business would ensue. Each might have his own attorney, and each record might be made up on a principle different from any other, which would require from this court a critical examination of each record. When would the court get through with the cases? If events should take this course, as they very well may, what would the consequences be? But if the test cases now before the court are promptly taken up and disposed of, it ends all chance of this great mass of litigation being precipitated on the court, because, if the legislation complained of be declared constitutional, the defendants must of course abandon their cases and pay the State in money; if the legislation is declared unconstitutional, then the defendants will win their cases in the State courts.

Now, on behalf of those I represent, let this be said. Many of them owe small taxes and are too poor to bring their cases to this court, as in the case of Neurohr, the execution against whom is appended to this notice. If the State is to go on piling up judgments upon these people, with costs added each time, being unable to bring their cases here, they are practically denied justice and made the victims of simple robbery.

As for those who might bring their cases here, if the court should sustain the legislation, as already remarked, they will know they must abandon the contest and pay the State in money. Equally, if the legislation is condemned, they are enabled to at once prove their coupons for the tax and the costs, and thus end the whole matter.

The motion which I make is, of course, an extraordinary one, and one which nothing but the most extraordinary state of affairs would justify me in making. But in the history of jurisprudence no such remarkable instance of a wholesale prostitution of judicial procedure to cover up an attempt at defiance of law can be found. I therefore feel justified in appealing to the court to exercise its powers to their very utmost to arrest the oppressions which the State of Virginia is heaping on citizens of the United States, in her endeavor to coerce them into abandoning their Federal rights, which this court has solemnly adjudged that the Constitution guarantees to them.

I therefore move the court, if it shall be of opinion that it has the power, to advance these cases to be heard with *Vashon* vs. *Greenhow*, requiring that notice of the time of hearing shall be served upon the Governor and Attorney-General.

Second. If it should be of opinion that it does not possess this power, I move that Rule 8 shall be modified, for the purposes of these cases only, and that the present writs of error being dismissed, if necessary, a new writ of error and citation may be issued, returnable thirty days after service; and if the case of *Vashon* vs. *Greenhow* is reached before the return-day of these, that it be passed until that return-day, that all the cases may be heard as one.

Third. In case neither motion is granted, I move that the cases of *McGahey* vs. *The State*, *Cooper* vs. *The State*, *Bryan* vs. *The State*, and *Ellett* vs. *The State* be advanced and assigned for argument on the second day of the next term.

Fourth. If that motion will not prevail of its own merits, and postponing *Vashon* vs. *Greenhow* to the second day of the next term will bring on the other four cases, to be heard with it as one case, I move that *Vashon* vs. *Greenhow* be passed until the second day of the next term, and that the cases named above be advanced and ordered to be heard with *Vashon* vs. *Greenhow*, all as one case, on the second day of the next term.

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William L. Royall being first duly sworn, deposes and says that he is an attorney at law, duly qualified to practise law in the courts of the State of Virginia. That he is informed and believes that the attorneys for the Commonwealth in the State of Virginia brought, during the winter and spring of 1888, in the courts of the State of Virginia, more than two thousand suits in the name of the State of Virginia against tax-payers in said State who had tendered her tax-receivable coupons in payment of their taxes, under the provisions of her act of Assembly, approved May 12, 1887, entitled "an act to provide for the recovery, by motion, of taxes and certain debts due the Commonwealth, for the payment of which papers purporting to be genuine coupons of the Commonwealth have been tendered," which act is set out at large in the case of *Ex parte* Ayers, 123 U. S. R., p. 451. That affiant was retained to defend all said suits. That the first which came to trial were in the

Circuit Court of the city of Richmond. That affiant appeared at the trials and pleaded the tender of the State's tax-receivable coupons, and he was full-handed with proof that the coupons were genuine, but the judge who presided refused to allow any evidence to be introduced except the coupons themselves, unless the bonds from which they came were produced, which could not be done, and then instructed the jury that there was no evidence before them of the genuineness of the coupons. That in consequence of this ruling, which he applied to all the cases, the State recovered judgments for principal, interest, and costs in all the cases pending. That judgments were entered for the State in 367 cases. That every State judge who has had any of these cases before him has made the same ruling, and in all cases judgments have been entered against the defendants and in favor of the State. That in many places executions have gone out on these judgments, and the defendants, acting under affiant's advice, have tendered the State's tax-receivable coupons in payment of those executions; whereupon the sheriffs have refused to levy the executions, but have made return on the same that coupons had been tendered in payment of the same, and second suits on these judgments have been brought. That in many of the courts second judgments on these judgments, with full second costs, have been entered. That affiant is informed and believes that in one county (Clarke) third suits have been brought and third judgments entered, with full third costs. Affiant attaches hereto a letter to him from W. Roy Stephenson, attorney at law, to prove this statement. That amongst the places where these second suits have been brought and second judgments with full costs have been entered are Lynchburg city, the city of Staunton, the towns of Harrisonburg and Winchester, and the county of Loudoun; and affiant is informed and believes that the Auditor of the State has directed second suits to be brought in every place where coupons have been tendered in payment of the executions and third suits in all places where coupons have been tendered in payment of the executions on the second judgments.

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[Certificate.]

I certify that three hundred and sixty-seven judgments were entered in the Circuit Court of the city of Richmond against the defendants, who were sued by the Commonwealth after having tendered coupons in payment of taxes due to her.

Given under my hand this 26th day of December, 1888.

ALFRED SHEILD, Clerk.

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*The Commonwelth of Virginia—To the Sheriff of the city of Richmond, greeting:*

We command you, that of the goods, chattels, and real estate of Nicholas Neurohr, in your bailiwick, you cause to be made one dollar and eighty cents, with interest thereon, to be computed after the rate of six per centum per annum from the 15th day of December, 1887, until the 17th day of February, 1888, and with interest on the aggregate amount from the 17th day of February, 1888, until paid, which the Commonwealth of Virginia, late in our Circuit Court of the city of Richmond, has recovered, as well for certain taxes for the year 1887 as interest thereon; also sixteen dollars and forty cents, which in the same court were adjudged for the costs of this cause, whereof the said Nicholas Neurohr is convict, as appears to us of record. And how you shall execute this writ make known at the Rules to be holden in the clerk's office of our said Circuit Court on the first Monday in June next. And have then there this writ.

Witness, Alfred Sheild, clerk of our said court at Richmond, the twenty-sixth day of April, 1888, and in the one hundred and twelfth year of the Commonwealth.

ALFRED SHEILD.

A copy—Teste:

ALFRED SHEILD, Clerk.

| | |
|---|---|
| Principal, - - - - - - - - - - - | $ 1 80 |
| Int. from Dec'r 15, 1887, to Feb. 17, 1888, - - - | 02 |
| Costs, - - - - - - - - - - - - | 16 40 |
| Comm's, - - - - - - - - - - - | 71 |
| | $18 93 |

Levied May 28, 1888, on one pool-table and one beer pump, and on the same day eighteen dollars in coupons and ninety-three cents in money tendered in payment of this execution and said tender refused.

L. P. WINSTON, S. C. R.

A copy—Teste:

ALFRED SHEILD, Clerk.

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E. B. No. 8, p. 441.

COMMONWEALTH
vs. } Fi. fa. to June R's, 1888.
NICHOLAS NEUROHR.

*Witt & Pendleton*, p. q.
To hand April 27, 1888, at 6 o'clock P. M.
Judgment 17th Feb., 1888. O. B. No. 25, p. 478.

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W. ROY STEPHENSON,
*Attorney and Counsellor at Law,*
WINCHESTER, VA., December 21, 1888.

*Mr. W. L. Royall:*

Dear Sir,—Mr. Jno. L. Kitchen called upon me to-day, and tells me that his personalty is now levied on and advertised for sale in Clarke county on the 28th instant, under execution on third judgment against him on his tax-bill, and he is anxious to know what he shall do. At his request I write to tell you of this state of facts. What shall I tell him? He is very anxious to have the matter finally settled. Several other parties in his immediate neighborhood, he says, are in the same condition, and one man's property has recently been sold.

Yours respectfully,

W. ROY STEPHENSON.

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*To the Hon. R. A. Ayers, Attorney-General of Virginia:*

Take notice that on ——————, the ——— day of ——————, 1889, I shall move the Supreme Court of the United States, upon the papers hereto annexed, to advance the cases of *Bryan* vs. *The State*, No. 1458; *Cooper* vs. *The State*, No. 1459; *McGahey* vs. *The State*, No. 1460; and *Ellett* vs. *The State*, No. 1461. The said papers consist of the motion-paper itself, the affidavit of Wm. L. Royall, certificate of clerk of Circuit Court city of Richmond, certified copy of execution vs. Nicholas Neurohr, and letter from W. Roy Stephenson.

WM. L. ROYALL,
*Attorney for Plaintiffs in Error.*

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[From the Richmond *Dispatch* of April 10, 1889.]

### THE COUPON CASES IN THE CITY CIRCUIT COURT YESTERDAY.

Yesterday the second suits which the State has brought against tax-payers in the city of Richmond who have tendered coupons for their taxes and been sued and judgments entered were called for trial. Mr. William L. Royall appeared for the tax-payers, and moved the court to continue the cases until October next, for the following reasons:

First. Because the State's attorney is instructed to prosecute these second suits against those tax-payers ONLY who refuse to sign a pledge not to pay taxes in coupons in the future, and he intends to carry out his instructions. I insist that this is a tyrannical abuse of the law and the powers of this court, an unjust discrimination against one class of citizens, and an attempt to coerce them into relinquishing a right conferred upon them by the law by punishing them with another set of costs if they will not relinquish their right.

Second. Because the State has already obtained one judgment against the parties, and the entry of another judgment on that judgment can add no force or efficiency to the first, and can have but one purpose—to wit: to coerce the tax-payer into abandoning his tender of coupons through fear of being punished by the imposition of $16 more of costs.

Third. Because all the defendants in these cases are litigating with the State questions of great public concern, with a sincere belief that she has no right or authority under the Constitution of the United States to have any of these proceedings taken against them. They have carried all the questions involved to the final arbiter, the Supreme Court of the United States, and that tribunal has advanced their cases and ordered them to be argued and submitted on the third Monday of October next. The decision which it makes then will finally settle all the questions at issue between the defendants and the State, and I insist that these new suits should stand over until that decision is made.

Mr. Royall then asked Mr. Pendleton, who represented the State, if he denied the statement that he was instructed to move for judgment against those ONLY who would not promise to use coupons in the future. To this Mr. Pendleton stated that he had no answer to make; whereupon Mr. Royall stated that he was prepared then and there to show by official proof that he was so instructed.

The Judge overruled the motion for a continuance and directed the motions to proceed.

Mr Royall then said: "Well, the rest is only machine-work," and started to leave the court-room.

Judge Wellford said: "Are you not going to remain?"

Mr. Royall said: "No, I don't see any use of it. It is only to be run over."

The judge of the Circuit Court of Richmond is the judge of the Circuit Court of Henrico county, and he tried the cases of *Cooper* vs. *The State*, *Bryan* vs. *The State*, and *Ellett* vs. *The State*, submitted with this.

George R. Shinn offered to sell the State's coupons in Fredericksburg, in May, 1889. The Fredericksburg *Free Lance* of May 3, 1889, contained the following:

"CORPORATION COURT.—His honor Judge Wallace, after charging the grand jury generally, charged them especially in regard to the case of the *Commonwealth* vs. *George R. Shinn*, arrested for selling coupons without a license. Judge Wallace stated that the policy of the State of Virginia was to crush out coupons and keep them out of the treasury, and if there were no coupon-sellers there would be no coupon-buyers; he therefore hoped the grand jury would carefully examine into the case against Mr. Shinn, and if he was guilty, that he would be punished to the full extent of the law.

"The following indictments were found by the grand jury: *Commonwealth* vs. *Ray & Pettit*, *Same* vs. *George R. Shinn*, *Same* vs. *M. A. Gately*, misdemeanors."

On the 8th of May, 1889, I delivered to Hon. R. A. Ayers, Attorney-General of Virginia, a letter, of which the following is a copy:

"RICHMOND, VA., May 8, 1889.

"*Hon R. A. Ayers, Attorney-General of Virginia:*

"Dear Sir,—I enclose you an extract from the Richmond *Dispatch* of April 10, 1889, giving an account of what took place in the Circuit Court of the city of Richmond on the preceding day, when the State moved for second judgments in the coupon suits, and another from the Fredericksburg *Free Lance* of May 3, 1889, giving Judge Wallace's charge to his grand jury that it was the State's policy to destroy her coupons. It is but fair to you to notify you that I shall print these two extracts in my brief in *McGahey* vs. *The State*, in the Supreme Court of the United States, and I shall claim that the court may take judicial notice of them as part of the current history of the day.

"I give you this notice in order that you may inquire and learn whether the statements are true or not, if you shall think it a matter of any importance.

"Yours truly,

"WM. L. ROYALL."

The original papers of this record are filed with the clerk

# APPENDIX C.

SMITH
vs.
CLARK, JUDGE.
} Opinion of the Court.

Lewis, P. J.—This is a petition for a writ of prohibition, to prohibit and restrain the Honorable Wm. L. Clark, Judge of the Corporation Court for the city of Winchester, from proceeding further in a certain action pending in the said court, wherein the Commonwealth, suing by W. R. Alexander, attorney for the Commonwealth for the said city, is plaintiff, and the petitioner, German Smith, is defendant.

The grounds of the application for the writ are, that the petitioner tendered to the State, through her proper collecting officer, certain overdue, tax-receivable coupons of the State in payment of his taxes for the year 1886, assessed in the said city, which tender was refused; that afterwards suit was commenced against him for the recovery of the said taxes, in the said Corporation Court, under the supposed authority of the act of Assembly approved May 12, 1887, entitled "An act to provide for the recovery, by motion, of taxes and certain debts due the Commonwealth, for the payment of which papers purporting to be genuine coupons of the Commonwealth have been tendered" (Acts 1887, Extra Session, page 257 ; that petitioner appeared in the cause and objected to the jurisdiction of the court, but the objection was overruled, and judgment entered against him for the amount of the tax, with interest, penalty, and costs; that an execution issued upon this judgment, in payment of which petitioner tendered coupons; whereupon another suit in the same court was instituted against him, upon the said judgment, and another judgment rendered against him; that execution having issued upon said last-mentioned judgment, petitioner again tendered coupons; whereupon, another suit in the same court was commenced against him upon said last-mentioned judgment, which is now pending, and which is the proceeding the prosecution of which is sought to be prohibited.

The first section of the act above mentioned enacts as follows:

"That all taxes, including taxes on licenses, now due, or which may hereafter become due to the Commonwealth, in payment of which any paper or instrument purporting to be a coupon detached from a bond of this State shall have been or may hereafter be tendered and not accepted as payment, and not otherwise paid, may be recovered *in the Circuit Court* having jurisdiction over the county or corporation in which said taxes shall have been assessed;

or if the tender was made to the Auditor of Public Accounts, in payment of taxes which he is authorized by law to receive, the said taxes may be recovered in the Circuit Court of the city of Richmond."

The third section enacts that "the proceeding shall be by motion, in the name of the Commonwealth, on ten days' notice, and shall be instituted and prosecuted by the attorney for the Commonwealth of the county or corporation in which the proceeding is; or if it be instituted by direction of the Auditor of Public Accounts, in the Circuit Court of the city of Richmond." The act then goes on to provide for the rendition of judgment and the issuance of execution, and by the ninth section enacts as follows:

"Should coupons be tendered the officer in satisfaction of said execution, he shall note the fact of such tender upon the execution, and return it to the clerk's office, and thereupon the Auditor of Public Accounts may direct an action to be brought upon the judgment. This action shall be instituted and prosecuted in the mode hereinbefore prescribed for actions to recover judgments for taxes, and similar actions may be instituted whenever coupons are tendered in satisfaction of any judgment obtained by the Commonwealth under the provisions of this act."

The argument in support of the application for the writ is, that the action in question was brought under the aforementioned act of May 12, 1887, and that that act provides for suits *in the Circuit Courts* only; that independently of that act the attorney for the Commonwealth has no authority to bring an action for the Commonwealth like the one in question, and therefore that the said Corporation Court has no jurisdiction to entertain the action, and the proceeding is *coram non judice*.

We are of opinion that this position is well taken, and consequently that the writ must be awarded as prayed for in the petition; and it is so ordered.

A copy—Teste:

JAS. B. DORMAN, *Clerk*.

At a Supreme Court of Appeals of Virginia, held at the courthouse of Augusta county, in the city of Staunton, on Thursday, September 19, 1889:

GERMAN SMITH, Petitioner,
AGAINST
W. L. CLARK, Judge, &c.

Upon the petition of German Smith for a writ of prohibition to prohibit and restrain the Honorable W. L. Clark, Judge of the Corporation Court for the city of Winchester, from proceeding further in a certain action pending in the said court, wherein the Commonwealth, suing by W. R. Alexander, attorney for the Commonwealth for the said city, is plaintiff, and the petitioner, German Smith, is defendant:

This day came again the petitioner, by counsel, and the court, having maturely considered the petition aforesaid, and the papers filed therewith, is of opinion, for reasons stated in writing and filed with the record, that the action aforesaid was brought under the act of Assembly of May 12, 1887, entitled "An act to provide for the recovery, by motion, of taxes and certain debts due the Commonwealth, for the payment of which papers purporting to be genuine coupons of the Commonwealth have been tendered," which said act provides for suits in the *Circuit Courts* only; that independently of that act, the attorney for the Commonwealth has no authority to bring an action for the Commonwealth, such as the one in question, and therefore the said Corporation Court has no jurisdiction to entertain the same.

It is therefore adjudged and ordered that a writ of prohibition be awarded, according to the prayer of the said petition, directed to the said defendant, Wm. L. Clark, judge as aforesaid, commanding him to proceed no further in the said action now pending in the said Corporation Court, but to dismiss the same.

And it is further adjudged and ordered that the service of an office copy of this order upon the said defendant shall have the same force and effect as the execution upon him of a writ of prohibition, issued in pursuance hereof, which is ordered to be certified to the said Corporation Court of the city of Winchester.

A copy—Teste:

JAMES B. DORMAN, *Clerk*

| | |
|---|---|
| Fee for copy of opinion, | $1.00 |
| " " " " decree, | 35 |
| | $1.35 |
| Postage, - - - | 5 |
| Total, - - | $1.40 |

Office Supreme Court U. S.
FILED.
OCT 16 1889
JAMES H. McKENNEY,
CLERK.

# Supreme Court of the United States.

October Term, 1889.

JOHN McGAHEY,
*Plaintiff in Error,*
vs.
THE STATE OF VIRGINIA.

No. 1057.

## BRIEF FOR PLAINTIFFS IN ERROR.

D. H. CHAMBERLAIN,
*Counsel for Plaintiffs in Error.*

# Supreme Court of the United States.

OCTOBER TERM, 1889.

JOHN McGAHEY,
Plaintiff in Error,
*vs.*
THE STATE OF VIRGINIA.

No. 1057.

## Brief for Plaintiff in Error.

### STATEMENT.

The plaintiff in error here was the defendant in the Court below in a suit brought by the State of Virginia —*Commonwealth of Virginia* vs. *McGahey*— in accordance with the Act of Virginia of May 12th, 1887.

That Act is in the terms following:

"An Act to provide for the recovery, by motion, of taxes and certain debts due the Commonwealth, for the payment of which papers purporting to be genuine coupons of the Commonwealth have been tendered. (Approved May 12th, 1887.)

"1. Be it enacted by the General Assembly of Virginia, that all taxes, including taxes on licenses, now due or which may hereafter become due to the Commonwealth, in payment of which any paper or instrument purporting to be a coupon detached from a bond of this State shall have been or may hereafter be tendered and not accepted as payment and not otherwise paid, may be recovered in the Circuit Court having jurisdiction over the county or corporation in which said taxes shall have been assessed, or if the tender was made to the auditor of public accounts in payment of taxes which he is authorized by law to receive, the said taxes may be recovered in the Circuit Court of the City of Richmond.

"2. The Court shall have jurisdiction without regard to the amount of the taxes claimed, and though the amount be less than twenty dollars.

"3. The proceeding shall be by motion, in the name of the Commonwealth, on ten days' notice, and shall be instituted and prosecuted by the attorney for the Commonwealth or corporation in which the proceeding is, or, if it be instituted by direction of the auditor of public accounts, in the Circuit Court of the City of Richmond.

"4. The notice may be served in any county or corporation in the State in the mode prescribed by the first section of chapter one hundred and sixty-four of the code (edition of eighteen hundred and seventy-three), or it may be served on any agent of the defendant in the county or corporation in which the proceeding is, and the word 'agent,' as here used, shall include any person who shall have made the tender aforesaid on behalf of the defendant, or if there be no known agent of the defendant in the said county or corporation it may be served by the publishing the same one time in some newspaper printed in the county or city where the tax was assessed, or if there be no paper printed in such county or city, then in some newspaper published in some county or city, nearest to the county or city where such tax was assessed.

"5. The motion may be tried or heard by the Court or jury as motions in other civil cases. If the defendant relies on a tender of coupons as payment of the taxes claimed, he shall plead the same specifically and in writing, and file with the plea the coupons averred therein to have been tendered, and the clerk shall carefully preserve them. Upon such plea filed, the burden of proving the tender and the genuineness of the coupons shall be on the defendant. If the tender and the genuineness of the coupons be established, judgment shall be for the defendant on the plea of tender. In such case the clerk shall write the word 'proved,' and thereunder his name in his official character, across the face of the coupons, and transmit them, together with a certificate of the court that they have been proven in the case, to the auditor of public accounts, who shall deliver the coupons to the second auditor, receiving therefor the check of the second auditor upon the treasurer, which check he shall pay into the treasury to the credit of the proper tax account.

"6. If the defendant fails in his defence and the taxes claimed are found to be due the State, any coupon filed by him with a plea of tender (and not spurious) shall be returned to him, and there shall be judgment for the Commonwealth for the aggregate amount of the taxes due and the interest thereon from the time they became due till the date of the judgment, with interest on the said aggregate amount from the date of the judgment until payment, and costs.

"7. No antecedent lien of the Commonwealth for the taxes for which any judgment is rendered shall be deemed to be merged in the judgment or otherwise impaired by the recovery of the same, but such lien shall continue in force, notwithstanding the judgment.

"8. Every such judgment shall be docketed, as prescribed by law in other cases, and the clerk shall issue execution thereon, directed to the sheriff of any county (or sergeant of any city) who shall account for the money collected thereon to the auditor of public accounts.

"9. Should coupons be tendered the officer in satisfaction of said execution, he shall note the fact of such tender upon the execution and return it to the clerk's office and thereupon the auditor of public accounts may direct an action to be brought upon the judgment. This action shall be instituted and prosecuted in the mode herein prescribed for actions to recover judgment for taxes, and similar actions may be instituted whenever coupons are tendered in satisfaction of any judgment obtained by the Commonwealth under the provisions of this act.

"10. The clerk of the Court in which any such judgment is rendered in behalf of the Commonwealth shall, as soon as it is rendered, transmit a certified abstract thereof to the auditor of public accounts, who shall record the same in a book to be kept for that purpose.

"11. Immediately after the passage of this act the county and city treasurers, and all other officers authorized by law to collect or receive money for taxes due the Commonwealth, including the license taxes, shall report to the Commonwealth's attorneys of their respective counties and cities, and also to the auditor of public accounts, the names of all persons assessed or liable therein for taxes due the Commonwealth who have heretofore tendered (otherwise than for identification and verification) coupons for such taxes, and which taxes remain unpaid, the amount of the taxes due, on what account, and when they become payable, and a description, as far as possible of the coupons tendered, and when tendered; and they shall thereafter make like reports whenever and as soon as any such tender may be made. As soon as the auditor of public accounts shall receive such reports he shall credit the proper officer with the taxes named therein for which coupons were tendered.

"12. The attorneys for the Commonwealth, and the Attorney-General, when it is his duty under this act to represent the Commonwealth in any case in the Circuit Court in the City of Richmond, upon such report being made to them, or whenever they are otherwise informed of any such tender having been made, shall forthwith institute and prosecute such proceedings as are hereinbefore required.

"13. In any case instituted under the provisions of this act, in which there is a judgment for the Commonwealth, a fee of ten dollars shall be allowed the attorney for the Commonwealth, or the Attorney-General, as the case may be, which fee and fees of the clerk and other officers for services rendered in the case, as well as such other costs as are allowed by law in other cases in which the Commonwealth is a party, shall be taxed in the costs against the defendant. The Commonwealth shall not be liable for any fees or costs in any proceedings under this act.

"14. If any officer fail to perform any duty required of him by this act he shall be fined not less than one hundred dollars nor more than five hundred dollars.

"15. This act shall be in force from its passage."

## **First.**

The *first exception* of the plaintiff in error raises the question of the validity of the above Act.

This Act having been before this Court in *In re Ayers* (123 U. S., 443), and being again drawn in question in this case, it is important to ascertain what has already been decided respecting it.

The question involved in *In re Ayers* was thus stated by the Court:

"The question in the present case, therefore, is *whether the Order of the Circuit Court* of June 6, 1887, forbidding the petitioners from bringing suits under the Act of May 12, 1887, in the name and on behalf of the State of Virginia, as its attorneys, for the recovery of taxes, in payment of which the taxpayers had previously tendered tax-receivable coupons, *is an order which that Court had power by law to make.* The question really is *whether the Circuit Court had jurisdiction to entertain the suit* in which that order was made, because the sole purpose and prayer of the bill are, by a final decree, perpetually to enjoin the defendants from taking any steps in execution of the Act of May 12, 1887."

The case being *habeas corpus* to discharge the petitioners from imprisonment for contempt of Court in disobeying the order made by the Circuit Court, the question was necessarily one of the jurisdiction of the Circuit Court to make the order which was disobeyed, the power of this Court to discharge the petitioners in such cases or to review such orders being always dependent on the question of the jurisdiction of the Court below to make the order complained of.

> *In re Ayers* (123 U. S., pp. 485, 486, and cases there cited).

The conclusion of the Court in *In re Ayers* is to the same effect :

> " We adjudge the suit of *Cooper and others* vs. *Marye and others*, in which the injunctions were granted against the present petitioners, to be in substance and in law *a suit against the State of Virginia*. . . . The Circuit Court was without jurisdiction to entertain it. . . . The orders adjudging the petitioners in contempt were void, and their imprisonment is without authority of law " (p. 507).

It is obvious that if the suit in *In re Ayers* was in law a suit against the State, the question of the validity or invalidity of the authority or act under which the petitioners professed to be acting when the alleged contempt was committed, was not drawn in question, and could not have been authoritatively passed upon. In deciding whether the suit was one against the State, it could not matter whether or not the act complained of were valid or invalid. If the suit was one against the State, that conclusion could not be affected by the character of the act, the execution of which the suit was brought to prevent.

If, therefore, in the decision of that case, there were to be found any apparent opinions respecting the constitutionality or unconstitutionality of the act of May 12, 1887, they would be necessarily *obiter dicta*.

At this point it may be well to call attention to the precise aspect of the present case.

As has already been said, this is a suit *by the State against the taxpayer*, not a suit or proceeding, as in many or most of the cases heretofore presented here on this general topic, by a taxpayer to compel or restrain action by the State, or by the officers or agents of the State.

In strict terms, this is such a suit as is described by Mr. Justice Bradley in his dissenting opinion in *Virginia Coupon cases*, 114 U. S., pp. 335, 336.

> "But, then, it will be asked, has the citizen no redress against the unconstitutional acts or laws of the State? Certainly he has. There is no difficulty on the subject. *Whenever his life, liberty or property is threatened, assailed or invaded by unconstitutional acts, or by an attempt to execute unconstitutional laws*, he may defend himself, in every proper way, by *habeas corpus*, by defence to prosecutions, by actions brought on his own behalf, by injunction, by mandamus. Any one of these modes of redress, suitable to his case, is open to him. *A citizen cannot, in any way, be harrassed, injured or destroyed by unconstitutional laws without having some legal means of resistance or redress.* But this is where the State or its officers moves against *him*. The right to all these means of protection and redress against unconstitutional oppression and exaction, is a very different thing from the right to coerce the State into a fulfillment of its contracts. *The one is an indefeasible right, a right which cannot be taken away*; the other is never a right, but may or may not be conceded by the State; and, if conceded, may be conceded on such terms as the State chooses to impose.
>
> "All the cases that are cited from the books in which redress has been afforded to individuals by the Courts against State action are cases arising out of the first class, and not out of the second; cases of State aggression, and not of refusal to fulfill obligations" (pp. 335, 336).

At page 332 also, the same Justice thus states the ground of the present appeal to this Court, as well as the objection to the suits involved in *Poindexter* vs. *Greenhow*. After remarking that a State cannot be coerced by the Judiciary into a compliance with its contracts, Mr. Justice Bradley says:

> "It is true *it* (the State) *cannot proceed against them* (*individuals*) *contrary to its contract;* but on the other hand, it (the State) cannot be proceeded against on its contract."

The plaintiff in error presents himself here, therefore, as one whose rights, he claims, are assailed by the State. He asks nothing of the State: seeks no affirmative or preventive relief against the State. He simply insists that he is assailed and injured without warrant of law and in violation of his constitutional rights.

This presents the plain, unembarrassed issue of the constitutional validity of the Act of 1887.

This Act, in brief, authorizes and requires the officers of the State to bring suits against all taxpayers of Virginia who have tendered or may hereafter tender her tax-receivable coupons for taxes, which coupons shall not be accepted as payment.

The present suit was brought under this Act, the plaintiff in error having tendered coupons in payment of taxes.

The fact of the tender was proved by the plaintiff in error (*Record*, p. 5).

The plea of tender further averred that the plaintiff in error had at all times been ready and willing to make good the tender, and "now brings the said coupons and money into Court, ready to be paid to the plaintiff." (*Record*, p. 4.)

The original and continued tender of the coupons, therefore, appears as a fact in the case.

The record, moreover, shows no denial of the genuineness of the coupons nor any averment of a suspicion thereof

The question presented under the *first* exception is, therefore, this : Is an Act of the State which directs a suit to be brought against a taxpayer of Virginia who has tendered, and continued to tender, and now tenders tax-receivable coupons in payment of taxes, a valid act, or is it in violation of the Constitution of the United States ?

There are other acts which are hereafter of importance in this case, but at this point the exact question is : Has the State in view of her coupon contract, the right to bring this suit ?

It is necessary to enquire here, *what is the coupon contract ?*

The coupon contract is found in the Act of March 30, 1871, of the Virginia legislature, which in providing a scheme for resettlement of the public debt, declared that the coupons attached to the bonds to be issued under that Act "shall be payable semi-annually, and be receivable at and after maturity for all taxes, debts, dues and demands due the State; which shall be expressed on their face."

The earliest construction of this language was made by the Virginia Court of Appeals in 1872, in *Antoni* vs. *Wright* (22 Grattan, 933), where it was held, *first*, that the above language constituted, as soon as the coupons were issued, a valid contract, and *second*, that a subsequent act forbidding the receipt of the coupons for taxes was a violation of this contract and hence void ; and a *mandamus* was allowed to compel the performance of the contract.

The opinion in that case remains, at the end of seventeen years of legal controversy, the best statement perhaps yet made of the fact, motive, character and scope of the coupon contract.

In 1873, the legislature provided that there should be retained from the interest due on the bonds a certain tax laid on the bonds, and the validity of this provision was before this Court in *Hartman* vs. *Greenhow* (102 U. S., 672) decided here in 1880. This Court there held that the coupon contract was a contract whereby "the State bound herself, not only to pay the bonds when they became due, but to *receive the interest coupons from the bearer* at and after their maturity, to their full amount, for any taxes or dues by him to the State;" and that this contract was valid and inviolable; that no act of the State changing it to the injury of the creditor, was valid, and that the levy of a tax on the coupons withholding it from the amount due on the coupon was a violation of the contract, and void.

In 1882, the legislature passed an Act the substance of which was to direct tax collectors to refuse coupons but to give tax payers the remedy of a suit to recover the money paid in place of coupons. The validity of this Act was before this Court in 1882, in *Antoni* vs. *Greenhow* (107 U. S., 769), where the Court, after referring to the former decisions, both here and in Virginia, says: "These questions"—the existence, validity and inviolability of the coupon contract—"are no longer open in this Court. *Any act of the State which forbids the receipt of these coupons for taxes is a violation of the contract, and void as against the coupon holders.*"

Again in the same case, the Court says: "*The right of the coupon holder is to have his coupon received for taxes when offered.*"

In 1882 the legislature passed an Act requiring tax collectors to receive for taxes and other dues, only gold, silver, United States Treasury notes, and National Bank currency. Under this Act arose the case of *Poindexter* vs. *Greenhow* (114 U. S , 269), in which the tax collector acting under authority of the last named act, had refused to receive coupons when tendered and had proceeded to distrain the property of the tax-payer for the same taxes.

This Court held the above named act to be "not a law of the State of Virginia, because it impairs the obligation of its contract (the coupon contract) and is annulled by the Constitution of the United States. The Court says (p. 271) :

"The State has passed no such law, for it cannot, and what it cannot do, in contemplation of law, it has not done. The Constitution of the United States and its own contract, both irrepealable by any act on its part, are the law of Virginia, and that law *made it the duty of the defendant to receive the coupons when tendered in payment of taxes, and declared every step to enforce the tax thereafter taken, to be without warrant of law, and therefore a wrong.*"

The Court (p. 279) again says : "From that time (the passage of the Act of March 30th, 1871, authorizing the issue of the bonds and coupons), it became the legal duty of every tax collector to receive coupons from those bonds offered for that purpose by tax payers in payment of taxes, upon an equal footing, at an equal value, and with equal effect, as though they were gold or silver or legal tender treasury notes. They were by that Act reduced in effect into money, and as between the State and its tax payers were a legal tender as money, and being not only a law but a contract, it became by force of the Constitution of the United States, irrepealable. and therefore is to-day what it was when first enacted, the unchangeable law of Virginia."

And again (same page): "After a tender of such coupons by a tax payer in payment of taxes, and a refusal by a tax collector to receive them, the situation and rights of the tax payer and coupon holder were precisely what they would have been if he had made a like tender in gold coin and it had been refused."

And again (page 280): "In the hands of the tax payer who buys them for tender, they are practically no longer choses in action, but equal in value and quality to money, and equivalent to receipts for taxes already paid."

And again (p. 281): "As we have seen, the coupon holder whose tender of genuine coupons in payment of taxes has been refused, stands upon the same footing in this respect as though he had tendered gold coin in similar circumstances, and with like results."

And again (same page): "It is well settled by many decisions of this Court that for the purpose of affecting proceedings to enforce the payment of taxes, a lawful tender of payment is equivalent to actual payment, either being sufficient to deprive the collecting officer of all authority for further action, and making every subsequent step illegal and void."

And again, in answer to the suggestion that the State had a right to require payment in current money and leave the coupon-holder to recover it back by suit, this this Court says (p. 300): "The answer is obvious and complete. Virginia, by a contract which the Constitution of the United States disables her from impairing, has bound herself that it shall be otherwise. The State has agreed that the coupons cut from her bonds shall be received in payment of taxes due to her as though they were money. When a taxpayer has tendered such coupons, he has complied with the agreement, and in legal contemplation, has paid the debt he owed the State. *So far as that tax is concerned and every step taken for enforcing its payment in disregard of that tender, the coupon-holder is withdrawn from the power and jurisdiction of the State. He is free from all further dis-*

*turbance and is securely shielded by the Constitution in his immunity. No proceeding, whatever its pretext which does not respect this right, can be judicially upheld.*"

The following statement of conclusions seems to be warranted as the result of past decisions on the subject of the coupon contract:

*First.*—That the contract expressed in the Act authorizing the issue of the bonds and coupons was in all respects a valid, legal contract.

*Second.*—That as such, it is protected from essential or injurious change by the Constitution of the United States.

*Third.*—That while a change of remedy for enforcing the contract, from *mandamus* to a suit to recover money paid in *lieu* of coupons, is not an infraction of the contract, a tender of coupons is such payment or discharge of the obligation to pay taxes, as deprives the State and its officers and agents, of the right to enforce other or further payment.

*Fourth*—That when a taxpayer, as in the present case, has tendered coupons and has kept the tender good, the contract disables the State from further pursuing him for the same taxes; or, as was said in *Poindexter* vs. *Greenhow* (p. 281), deprives the State and her officers "of all authority for further action, and makes every subsequent step illegal and void"; or as was said again, in the same case (p. 300), "The State has agreed that the coupons cut from her bonds shall be received in payment of taxes due her as though they were money. When a taxpayer has tendered such coupons, he has complied with the agreement and in legal contemplation, has paid the debt he owed the State. SO FAR AS

Thereupon the plaintiff in error offered his coupons in evidence and they were received (*Record*, *Id.*). The plaintiff in error then proved that he never owned the bonds from which the coupons were cut, and knew nothing respecting their ownership; that he purchased the coupons in open market as genuine coupons and without reason to doubt their genuineness (*Record*, fol 6).

The coupons being wholly engraved and in no part manually written, the plaintiff in error, assuming the burden imposed on him by the Act of May 12, 1887, of proving the genuineness of the coupons, offered to prove by an expert witness that the coupons were genuine.

The Court refused to receive this testimony because of the Act of January 21, 1886, now § 412, Code of 1887, which provides as follows:

> "And it is further provided that expert evidence shall "not be received to prove the genuineness of any paper "or instrument made by machinery or any other man-"ner than by the actual or personal handwriting of the "party to be charged or his agent."
>
> *Act of January 21, 1886.*

> "Where any paper purporting to be a coupon cut "from a bond of the State is offered in evidence in any "case, the burden of showing its genuineness shall be on "the party offering it. If the paper be printed, en-"graved or lithographed, the expert testimony shall "not be received to establish such genuineness. At the "hearing or on the trial of the issue, the party contest-"ing the genuineness of such coupon may call for the "production of the bond from which the coupon was "detached, and the plaintiff shall be required to pro-"duce the bond as a condition precedent to his right of "recovery."
>
> *Code of 1887, § 412.*

The plaintiff in error excepted. (*Record*, fol. 9.)

This act or provision of the statutes of Virginia is, on perfectly familiar grounds, a violation of the coupon contract and void as to the coupons.

Conceding, for a moment, that the State can lawfully sue in this case, and can put the burden of proving the genuineness of the coupons on the defendant, the question is,can she go further and deprive the taxpayer of the right to prove his coupons by expert testimony?

The doctrine is too well settled to require more than statement, that any act or statute which places new and injurious burdens or conditions upon a party to a contract, that is, makes it essentially or substantially more difficult to assert or maintain his contract or his rights under it, impairs the obligation of the contract.

Green *vs.* Biddle, 8 Wheat., 84.
Louisiana *vs.* New Orleans, 102 U. S., 203,-6-7.

Now, all the Virginia tax-receivable coupons are engraved,- not written. If they were in any part written, *they might* be proved genuine by other than expert testimony, as by the testimony of those familiar with the handwriting of the person whose writing purports to appear on the coupons. Such testimony is not expert testimony.

But in the case of these engraved coupons—and all coupons of all bonds are universally engraved and not written—how *can* their genuineness be proven?

No one who is not an expert—one taught and made skillful by experience, use or practice in connection with engraved instruments—can prove their genuineness. Familiarity with the art of engraving or with the appearance of engraved instruments is the only qualification which will enable a witness to prove the genuineness of an engraved instrument, and such a witness is an expert.

It could not be required or have been intended to be required, of each coupon holder that he should prove by the person who engraved the plate or made the impressions from it, that the coupon was genuine. This would be to require a physical impossibility. There was but one engraved plate, and those who made the impressions could not possibly have been supposed to be available as witnesses to the genuineness of every coupon. This is incredible.

If proof of genuineness became necessary, how can it be supposed that it was intended such proof should be made?

Engraving is a special art, not a universal acquirement, like handwriting. Handwriting has a character and individuality, as is well known, which enables one who has seen its supposed author write or has frequently seen undoubted specimens of the same person's handwriting, to give testimony as to its genuiness.

Not so with engraving. Engraving takes no color or character from the engraver. No one but an expert—one having special knowledge derived from special acquirements or experience, can prove, or is competent by any test to attempt to prove the genuineness of engraved instruments.

The exclusion of expert testimony to prove the genuineness of these coupons is, therefore, in truth the exclusion of all proper and competent testimony to that end.

It is worthy of notice here as showing motive, that while the Act of January 21, 1886, on this point, is in general terms, "any paper or instrument made by machinery," &c., the Code of 1887 has confined the provision strictly to "*any paper purporting to be a coupon cut from a bond of the State*," &c.

The pretence, therefore, that this is a general rule of evidence, is exposed. It is a special rule applicable only to *coupons of bonds of the State.*

So that the question really is, can the State put this special burden on coupons of State bonds alone ?

But having reference solely to the language of the Act of January 21, 1886, we say that its actual effect is, as it was doubtless intended to be, to deprive the coupon holder of any means of proving the genuineness of his coupons

The defence put forward of this Act is that it merely prescribes a rule of evidence in the Courts of Virginia—a matter wholly within the control and power of the State.

As a general statement, no one disputes that the State may prescribe rules of evidence in her own Courts. Except in cases covered by some restrictive provision of the Constitution of the United States, there is no limit to the power of the State in this respect.

But a State being prohibited by the Constitution from passing laws impairing the obligation of contracts, it is put beyond the power of a State by *any* act, statute or law, no matter what its general subject matter may be, to impair the obligation of a contract. The question always is. not what is the general subject or language of an Act, but does the act really, *in effect*, burden, injure, *impair* the obligation of the contract in question. Names and terms count for nothing ; the substance and effect alone are considered. Given a State law which can be seen to impair the obligation of a contract, and though in general its subject matter may be completely within the power of the State, it is, *as to any contract which it impairs*, unconstitutional and void.

Hence, though it were conceded that this act was passed solely and in good faith to prescribe a rule of evidence applicable in all the described cases, yet if it be seen to injuriously affect contracts already existing, it must be pronounced void as to all such contracts.

When, therefore, it is seen, as here (1), that the provision in question is aimed only at coupons of State bonds, and (2) that the effect of the act is to prevent the possibility of proving the genuineness of the coupons, no doubt can remain of its invalidity.

To the question, why Virginia may not do this as to the coupons, when she is generally competent to prescribe any rule of evidence in her own Courts, the answer, as was said in *Poindexter* vs. *Greenhow*, "is obvious and complete. Virginia, by a contract, which the constitution of the United States disables her from impairing, has bound herself that *it shall be otherwise*."

## **Third.**

The offer of the plaintiff in error to prove the genuineness of his coupons by the testimony of an expert witness having been refused by the Court below, he rested, as it is plain he must have done, having no other means of proof. Thereupon, the State demanded, under the provisions of the Act of January 26, 1886, the production of the bonds from which the coupons were cut, with proof that the coupons were actually cut therefrom (*Record*, fol. 9).

The Act of January 26, 1886, is as follows, and is now incorporated into § 412 of the Code of 1887, as already cited, *supra :*

"That in the trial of any issue involving the genu-
" ineness of a coupon appearing or purporting to have
" been cut from any bond authorized by law to be is-

"sued by the State of Virginia, or by any city, county, "or corporation, the defendant may demand the production of the bond; and thereupon it shall be the "duty of the plaintiff to produce such bond with proof "that the coupon was actually cut therefrom."

The plaintiff in error moved to disallow the demand thus made, on the ground of the repugance of the Act of January 26, 1886, to the Constitution. The Court held said act to be valid, and sustained the demand. Thereupon the plaintiff in error excepted (*Record*, fol. 9).

The plaintiff in error further raised the same objection by a request to the Court to instruct the jury that the Act of January 26, 1886, was unconstitutional, and that the production of the bonds was not necessary. The Court refused the instruction, and the plaintiff in error excepted (*Record*, fol. 9).

The exact effect of this act should be clearly seen. *The genuineness of no coupon of any State bond can be proved except by producing the bond, and proving the actual cutting from it of such coupon.*

It ought also to be observed that the original Act of January 26, 1886, was couched in general terms, and applied to bonds issued "by the State of Virginia, *or by any city, county, or corporation.*"

But in its present form, in § 412 of the Code of 1887, this provision is strictly limited to "coupons cut from *bonds of the State.*"

This is, then, an attempt to establish a rule of evidence applicable only to these coupons. But we shall consider the provision here, as it appears in the original Act of January 26, 1886.

The form of the coupon appears at folio 6 of the record. It is made payable to "the bearer," and by the face of the bond the interest is made payable "on presentation of the coupons."

The coupons in question here are not dependent, as to the rights which their holder is entitled to, upon the bonds. They are ordinary coupons carrying all the rights to the holder which ordinary coupons carry.

To make the proof of their genuineness dependent on the production of the bonds is to deprive them of one of the ordinary and most valuable incidents and qualities of coupons, and is as clearly a new and injurious burden to the holder as it would be to make the proof of their genuineness dependent on the production of any other separate and independent instruments.

It would be quite superfluous to cite many authorities as to the substantial character of coupons of bonds. There can be no question that coupons by force of their name as well as of the decisions of all our Courts, are complete instruments within themselves, designed to be cut from the bonds, to pass into other hands, and to remain everywhere separate and independent contracts, as much so as if having no original connection with any other instrument.

2 *Daniel on Neg. Instr.*, §1489, *et seq.*

Accordingly, it has been held by this Court that suit may be maintained on coupons *without the production of the bonds.*

"Coupons or warrants for interest are drawn and executed in a form and mode *for the very purpose of separating them from the bond, and thereby dispensing with the necessity of its production* at the time of the accruing of each instalment of interest."

*Com. of Knox Co.* vs. *Aspinwall*, 21 How., 539.

Likewise, and for the same reason, a holder of coupons may maintain suit on them, though he is not the holder of the bonds.

*City* vs. *Lamson*, 9 Wall., 477.

Coupons are not barred by statutes of limitation until the bond is barred.

*Idem.*

They draw interest after maturity.

*Aurora City* vs. *West.*, 7 Wall., 82.

When severed from the bond they are in all respects negotiable and pass by delivery, like the bonds.

*Thompson* vs. *Perrine*, 106 U. S., 589.

Dishonor of coupons does not render either the bond or subsequently maturing coupons dishonored paper.

*Cromwell* vs. *County of Sac.*, 96 U. S., 51.
*Railway Co.* vs. *Sprague*, 103 U. S., 756.

Coupons of bonds being, then, independent instruments in their nature and legal qualities, notwithstanding the fact of their original physical connection with bonds, it follows that when the State issued the bonds and coupons in question, in the form in which they now exist, she gave the coupons the legal qualities which by law belong to coupons; and among these qualities, the right of the holder to sue on them without producing the bonds or without owning them.

The State is conclusively presumed to have intended that these coupons should have the qualities of independent securities, as well as that they should pass into any hands unembarrassed by any relation they had to the bonds.

The Act of January 26, 1886, therefore, in requiring that the bonds shall be produced, *as a condition of asserting any right inhering in the coupon*, has impaired the obligation of the contract of the coupon, and is void.

Not only can it be clearly seen that the contract is in a legal sense impaired, but it can be seen equally clearly that the practical effect must be in most cases to make it absolutely impossible for the coupon holder to prove his coupons at all.

It was shown to be impossible in the present case. It must be so in nearly all cases. But whether so or not, the requirement is in all cases a legal infraction of the contract. It makes the coupon a dependent instrument, dependent for its enforcement and value on the production in Court of the bond in all cases in which the coupon is tendered for taxes.

D. H. CHAMBERLAIN,
Counsel for Plaintiff in Error.

FILED.
JAN 24 1890
JAMES. H. McKENNEY,
*CLERK.*

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# In the United States Supreme Court.

OCTOBER TERM, 1889.

## VIRGINIA COUPON CASES.

JOHN McGAHEY,
*Plaintiff in Error,*
*vs.*
THE STATE OF VIRGINIA,
No. 1057.

*and seven other cases.*

## ARGUMENT of D. H. CHAMBERLAIN,

**January 21st, 1890.**

Stenographically Reported.

## THE VIRGINIA COUPON CASES.

## IN THE UNITED STATES SUPREME COURT.

JAN. 21, 1890.

MR. CHAMBERLAIN:

If your Honors please, I wish to ask the indulgence of the Court to allow my very brief argument to be taken by a stenographer and afterwards handed to the Court. My associate and opponents, I am sure, will not object to this request.

We present to-day, upon the general topic of Virginia coupons, no less than eight cases.

Three of those cases, namely, Nos. 1055, 1056 and 1057,—involve the constitutionality of three separate acts of the Legislature of Virginia.

Six of these cases, all in fact, except Nos. 1216 and 1217, are appeals from the Supreme Court of Appeals of Virginia.

The other two cases—Nos. 1216 and 1217—are appeals from the Circuit Court of the United States for the Eastern District of Virginia.

With the single exception of No. 1216, they are all suits brought by the State against taxpayers. And this brings me at once to the fact which differentiates most widely these cases from all that your Honors have heretofore heard in this long litigation. I say all but two, all but *one*, of these eight cases are suits by the State against taxpayers. In other words, we are the defendants, and the State is the plaintiff.

That this is an important distinction must be patent to the minds of the Court, especially of those members of the Court who, on previous occasions, have dissented from the views which we have presented and which in some cases have been held by the majority of the Court. I refer particularly to the dissenting opinion of Mr. Justice Bradley in the case of *Poindexter* vs. *Greenhow*, and I shall take leave to read a few words from that opinion, at pages 335 and 336.

Mr. Justice Bradley says: "It will be asked, has the citizen no redress against the unconstitutional acts or laws of the State? Certainly he has. There is no difficulty on the subject. Whenever his life, liberty or property is threatened, assailed or invaded by unconstitutional acts, or by an attempt to execute unconstitutional laws, he may defend himself in every proper way, by *habeas corpus*, by defense to prosecutions, by actions brought on his own behalf, by injunction, by *mandamus*. Any one of these modes of redress suitable to his case is open to him. *A citizen cannot in any way be harassed, injured, or destroyed by unconstitutional laws without having some legal means of resistance or redress.* But this is where the State or its officers moves against *him*. The right to all these means of protection and redress against unconstitutional oppression and exaction is a very different thing from the right to coerce the State into a fulfillment of its contracts. The one is an indefeasible right, a right which cannot be taken away; the other is never a right, but may or may not be conceded by the State; and if conceded, may be conceded on such terms as the State chooses to impose.

All the cases that are cited from the books in which redress has been afforded to individuals by the Courts against State action are cases arising out of the first class, and not out of the second; cases of State aggression, and not of refusal to fulfill obligations."

If your Honor please, we present ourselves in the attitude of the persons whom Mr. Justice Bradley there describes. We are resisting an assault of the State, in all but one of these eight cases, and I suppose, therefore, that we shall be heard by every Judge upon this bench, not only with patience and consideration, but with a certain welcome, as gentlemen coming here representing clients, who allege, at least, that they are suffering under *State aggression*.

I have said that there are three acts of the Legislature of Virginia which are here to be considered, and *first*, the Act of May 12th, 1887, which is especially involved in the case of *McGahey* vs. *The Commonwealth*, No. 1057.

At the outset of the discussion of that act, it is obviously a necessity that I should say a word as to its relations to the case of *In re Ayers*. I understood my friend, Mr. Tucker, particularly to say, and my friend, Mr. Ayers, to say the same—that the unconstitutionality of the Act of May 12, 1887, was adjudged and passed upon in *In re Ayers*. Well, certainly we differ widely upon many questions, but no difference could be greater than that between Mr. Tucker and myself on that subject. I say with great deliberation and with all the emphasis which I can command, that the constitutionality or unconstitutionality of the act of May 12, 1887, was not involved in *In re Ayers*, and what is more, it *could not have been involved*. Not only did this Court not, as a matter of fact, pass upon the constitutionality of that act, but it could not, as a judicial tribunal, observing the common rules which govern judicial tribunals, have passed upon its constitutionality.

Now, what was *In re Ayers?* The act of May 12, 1887, had directed certain officers of the State of Virginia to proceed against persons who tendered coupons for taxes. The complainant in that suit, Cooper, had filed a bill in the U. S. Circuit Court to enjoin these officers from executing the act, and the Circuit Judge granted the injunction; it was disobeyed, and the parties disobeying were imprisoned, and by *habeas corpus* were brought before this Court.

Now, what was, and what must have been, the question and the only question upon which that *habeas corpus* turned and must be decided? Was it the constitutionalty of that act, or was it the question whether that suit was or was not a suit against the State of Virginia? Not only must it have been the latter, but such is the express language of the decision. The statement of the case of *In re Ayers*, at page 486, is as follows: "The question in the present case, therefore, is *whether the order of the Circuit Court* of June 6th, 1887, forbidding the petitioners from bringing suits under the act of May 12, 1887, in the name and on behalf of the State of Virginia, as its attorneys, for the recovery of taxes, in payment of which the taxpayers had previously tendered tax-receivable coupons, *is an order which that Court had power by law to make.* The question really is, whether the Circuit Court had *jurisdiction to entertain the suit in which that order was made*, because the sole purpose and prayer of the bill are, by a final decree, perpetually to enjoin the defendants from taking any steps in execution of the Act of May 12, 1887.

Not only was that the statement which Justice Matthews made of the issue, but this is the *judgment* of the Court: "We adjudge the suit of Cooper and others against Marye and others, in which an injunction was granted against the present petitioners to be in substance and in law a suit against the State of Virginia." * * * The Circuit Court was without jurisdiction to entertain it. * * * The orders adjudging petitioners in contempt were void, and their imprisonment is without authority of law.

Now I pass on at once. I say that whoever, lawyer or judge, has examined this case, will discover beyond controversy or cavil that all that was decided in *In re Ayers* was, that the suit was a suit against the State, and that the constitutionality and merits of the statute of May 12, 1887, have never been passed upon by this Court to the present day.

I may not be here, but I shall be anxious to hear what answer Mr. Tucker makes to this very broad statement and challenge, which I now make.

If your Honors please, let us discuss the merits of the act of May 12, 1887, for a single moment. I understood Mr. Tucker to say as another reason why that act was passed upon in *In re Ayers*, that unless it had been a constitutional act, the Court would not have adjudged the order of the Circuit Court to have been invalid and void, but I have sufficiently pointed out that the only ground for adjudging that order void, was not the merits of the act, but the form of action. The very suit itself was a suit against the State of Virginia, and forbidden by the Constitution.

Now, the single present question about the Act of May 12, 1887, is: Does it, or does it not, impair *the Coupon Contract?* If it does, no one can prevent it from being condemned by this Court as an attempted infraction of the Constitution of the United States. That is a simple question: Does it violate the coupon contract?

And what is the coupon contract? It is simply the written contract by which the State of Virginia agreed to receive the coupons of its bonds, issued under the Act of March 30, 1871, in payment of "all taxes, debts, dues and demands due the State."

The Supreme Court of Appeals of Virginia, in Antoni *vs.* Wright (22d Grattan), passed upon every possible phase of that contract,—its moral obligation, its political sagacity, and its judicial force and meaning. I say they exhausted the subject in 1872 in the Supreme Court of Appeals of Virginia. They held it to be a valid contract, a wise contract, a generous contract on the part of the creditors of Virginia. They commended it not merely as an existing law, but as a higher law that Virginia should regard herself as fortunate to have enacted. At the end of seventeen years of the most arduous litigation participated in by the most eminent judges of this bench and of other benches, the decision in *Antoni* vs. *Wright* of the Supreme Court of Appeals of Virginia, in 1872, I may say, is the most complete and most worthy of memory of any of the literature which now clusters around this litigation.

In 1873, this general subject came here, and in *Hartmann* vs. *Greenhow*, in 102 U. S., this Court, speaking with deliberation and elaboration, decided that the Supreme Court of Virginia in *Antoni* vs. *Wright*, was wholly correct in its views of that contract, that it was a contract not only good for for Virginians, but good for everybody against the world, everywhere ; good in morals, good in law.

The contract came before this Court again in *Antoni* vs. *Greenhow*, in 1882, in 107th U. S., and although in that case, against our objection, this Court decided that the change of remedy which the Legislature of Virginia had made was a lawful exercise of the State's power, they did not fail to restate, Chief Justice Waite speaking, to restate in perhaps the briefest terms that it has ever been stated judicially, the substance and effect of this contract. Chief Justice Waite says: "The contract is valid, and the contract is that the coupons *shall be received for taxes*, WHEN OFFERED."

My friend Mr. Tucker has spoken about the prerogative of individuals and of States to postpone creditors to the end of the longest litigation. This Court has decided, and has never modified that view, that the coupon contract means that the coupon shall be received WHEN OFFERED ; and that is the contract concerning which we are now asking the question, whether this Act of May 12, 1887, violates it.

But let me say that this great question of the coupon contract was before this Court again in a still more notable case, that of *Poindexter* vs. *Greenhow*, in 1884, in 114th U. S. That case is later and more familiar to this Court and I do not propose to enlarge upon it.

The point of *Poindexter* vs. *Greenhow*, to which I do wish to call attention, and in special view of the argument or speech which has preceded mine, appears upon my brief, and it appears with all the illumination which the printer's art can give to it, and still it falls below the emphasis which it ought to have whenever this subject is discussed. The conclusion of Mr. Justice Matthews is as follows:

> "WHEN THE TAX-PAYER HAS TENDERED SUCH COUPONS, HE HAS COMPLIED WITH THE AGREEMENT AND IN LEGAL CONTEMPLATION HAS PAID THE DEBT HE OWED THE STATE. SO FAR AS THAT TAX IS CONCERNED, AND EVERY STEP TAKEN FOR ENFORCING ITS PAYMENT IN DISREGARD OF THAT TENDER, THE COUPON HOLDER IS WITHDRAWN FROM THE POWER AND JURISDICTION OF THE STATE. HE IS FREE FROM ALL FURTHER DISTURBANCE, AND IS SECURELY SHIELDED BY THE CONSTITUTION IN HIS IMMUNITY. NO PROCEEDING, WHATEVER ITS PRETEXT, WHICH DOES NOT RESPECT THIS RIGHT, CAN BE JUDICIALLY UPHELD."
>
> *Poindexter* vs. *Greehow*, 114 U. S., 300.

Now let us bring the act of May 12, 1887 to this test. It directs the officers of Virginia to bring suits against every person who has tendered or may hereafter tender coupons in payment of taxes, precisely as if no tender or no offer of payment of any kind had been made.

These suits involve the incident, which I shall discuss presently, of proving the genuineness of the coupons, but at this point what I now insist upon, is that when the tender of coupons has been made, Virginia, under *Poindexter* vs. *Greenhow*, has no power or jurisdiction to bring a suit to recover those taxes. Now, in the forefront of the act of May 12, 1887, and without reference to any other acts, the act attempts precisely what Mr. Justice Matthews, in that decision, held that the State could not do! Well, if your Honors please, the grave and gentle face of the author of that opinion is missed forever from this bench. Sir, I do not intend to be the unmeasured eulogist of any man, but I have earned the right, humble as I am, earned it by perfectly free and perfectly respectful criticism of other opinions of Mr. Justice Matthews, to say that much as this Court has in times past been adorned by great jurists, probably in power of literary and judicial statement, as well as of vast and ready learning, no man within our brief day has more greatly adorned this bench; and now that death has touched and glorified him, it is exceedingly pleasant to me to say that I believe that *Poindexter* vs. *Greenhow*, with all its conclusions and all its wealth of statement, is destined to go down to our children close beside *Sturgis* vs. *Crowninshield*, *Dartmouth College* vs. *Woodward*, *Marbury* vs. *Madison*, and the great earlier decisions which have extended to all lands the fame of this Court.

Such is *Poindexter* vs. *Greenhow*, and without any further elaboration, it condemns at one sweep and answers at one breath every argument which ingenuity and learning has presented here to-day in apology for this monstrous legislation.

The other two acts that are under consideration are, respectively, the Act of January 21, 1886, and the Act of January 26, 1886.

The Act of January 21, 1886, declares that no expert testimony shall be received in proof of any coupon. Now, if your Honors please, consider what these coupons are. They are engraved instruments; no manual writing upon them. How can they be proved? Not as you prove handwriting. How can they be proved except by expert testimony. Is there any difficulty about proving them by expert testimony? Has there ever been about proving any engraved instrument? I never heard of any. It is perfectly easy to bring experts, as they are called, that is, gentlemen familiar with the art of engraving, who can detect with quite as much certainty as an expert in handwriting, the false from the genuine, the spurious from the true.

Why, if your Honors please, coupons which are in everybody's pocket or vault, who is fortunate, and for which everybody longs, good in everybody's hands throughout the markets of the world, are discussed here to-day and characterized, pre-eminently, as "*parasites*." Parasitical is a hateful word, and let me say that as I listened with so much pleasure, as I always do to any utterance of my learned friend, I could not help thinking what an appropriate and effective argument, his of to-day would have been if it had been delivered in the last quarter of the seventeenth century! Possibly it would have been, if delivered in the first half of the eighteenth century, but never certainly since Lord Mansfield took the bench would such an argument as that have had anything but the charm of the moment for its eloquence and grace.

Coupons are *independent* instruments. This Court has held in every form in which it has come before it, that they are just as much substantive and independent instruments, as are the bonds to which they are attached. I say this without qualification, and in spite of my friend's pen noting my words, that this Court has held that coupons are precisely as independent instruments for any legal purpose as the bonds from which they are cut. The parasite has been made the equal of the original trunk. Coupons were *made to be cut off*. What does "coupons" mean? It means, if your Honors please, "*let us cut them off*," and that is what we are all anxious to do, and to use them, and here close toward the end of the nineteenth century, with at least a century of judicial decisions upon coupons, a gentleman, learned and eloquent, comes here and calls them *parasites*. He has dignified that term, but he has not degraded coupons.

If your Honors please, I have turned aside to some extent. What I want to say is simply this, that there is no way of proving these coupons at all except by expert testimony, and therefore, the Act of January 21, 1886, if allowed to stand, is an act to destroy the value and the possibility of use of every coupon of these bonds.

Gentlemen say, and this is their only serious argument—they say that this is simply the exercise of the State's power to *regulate the rules of evidence*. Well, nobody disputes the right of a State under ordinary circumstances, to regulate the rules of evidence, but there is a principle just as well recognized as any other in the law, that when a contract has been made, a party—a State—cannot impose a new injurious burden upon that contract, and therefore, whether it takes the form of a change of the rules of evidence or some other form, if the judicial mind can perceive that it imposes a hurtful burden on the contract, it makes no earthly difference whether it is a rule of evidence or a more direct stab at the contract.

And now of the other act of January 26, 1886.

That is an act—my friend spoke about, "treading close upon the precipice," in his argument—the State of Virginia, if your Honors' please, has trod closer than my friend upon the precipice of artful and malicious legislation. What has she done in the Act of January 26, 1886? She has declared that no man who takes coupons and holds them to day, shall prove one of them in her Courts, unless he brings along the bond to which it was originally attached!

It is not possible for me, it is not worth while to attempt, to duly characterize such legislation. But one purpose it can have; if allowed to exist, but one effect—the destruction of these coupons.

There are many other arguments, if your Honors please, which I have here upon my notes, but I am sure I shall best gratify the Court, and perhaps best serve the interests I represent, by leaving the whole matter here. What we ask is, that this Court shall put the seal of its fullest condemnation upon this dangerous and "unspeakable" legislation of the State of Virginia. I borrow a great word from Carlyle; "unspeakable" in the real enormity of its purpose and its character.

I have a single word to say with reference to the case of Vashon, to which my friend Mr. Tucker has not arrived. That is a case which attempts to except the availability of coupons in favor of a certain school tax.

Now, the constitution of Virginia, which was adopted in 1869. provides that certain funds shall be set apart for the "*free school*" fund, and it is said that because of that, the part of the tax destined for that end is not payable in coupons!

Now, if your Honors please, when the State of Virginia takes in a $30 coupon, does it not get *paid* $30? My friend's argument is, that if I pay $30 in money it will go to the school fund, but if I pay a $30 coupon, the school fund gets nothing. If it gets nothing, it is simply because the State refuses to honor it as part of the Free School fund!

Now I always return my thanks to this Court when it gives me its ear, and especially I do to-day, because I humbly trust that I am making my last argument on the subject of Virginia coupons. It is a strange statement, perhaps, for an attorney who lives by his profession to make, but there are considerations, to the worthy attorney at least, that are higher than his fees.

Virginia, let me say,—and my friend alluded to her forlorn condition,—Virginia is to day in the hands of her own best people. What earthly reason exists why that old State, aided by these gentlemen, should not be what she used to be, the mother of presidents and of statesmen, the glorious Old Commonwealth and Dominion? I fervently hope that when I next listen to the charms of Mr. Tucker's eloquence, it will be, when on some appropriate occasion, he shall tell us how, after the decision of the Court in these cases, wiping out these monstrous blots upon his State's escutcheon, the old State shall have restored her honor and retrieved all her disasters, and become, as I have said, what she was in "the brave days of old."

FILED.
SEP 18 1889
JAMES. H. McKENNEY,
*CLERK.*

# Supreme Court of the United States.

H. W. ELLETT
vs.
THE STATE OF VIRGINIA.
No. 1,058.

## BRIEF FOR PLAINTIFF IN ERROR.

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## BRIEF FOR PLAINTIFF IN ERROR.

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### STATEMENT OF THE CASE.

The plaintiff in error was sued by the State of Virginia, under the act of May 12, 1887, in the Circuit Court of the city of Richmond, for the sum of $39.52, which he owed her for taxes, for which he had tendered her her tax-receivable coupons. She recovered a judgment against him for that sum, with interest, penalty, and costs. (Record, p. 6.) Execution was issued on this judgment, and on the second day of May, 1888, the whole amount due on it was $64.49, of which $16.40 was costs. On that day Ellett tendered the sheriff, in payment of this execution, $63 in the State's over-due tax-receivable coupons and $1.49 in cash, which the officer refused to receive, because the costs were tendered in coupons; whereupon he made return on the execution, as the act of May 12th requires, that coupons were tendered in payment of it, and another action was brought on the judgment, for the said sum of $64.49, as said act directs shall be done. Ellett offered a special plea to this second action, setting forth the facts stated above, and averring that the officer refused to receive the coupons because the aforesaid act of May 12, 1887, forbade him to receive them, and that said act, in doing so, was repugnant to the Constitution of the United States. The

State moved the court to reject this plea, (which, under Virginia practice, is the same thing as a demurrer to the plea,) for the reason that the costs had been tendered in coupons, and the court sustained the motion, making its reasons a part of the record, against defendant's claim that the statute of Virginia, which forbade him to pay the costs in coupons, is repugnant to the Constitution of the United States. These reasons are at page 10 of the record. The case then came on for trial, when the defendant pleaded his tender; but at the trial the court refused to allow him to prove the tender, for the reason that the costs had been tendered in coupons, against defendant's claim that the statute or statutes of Virginia, which forbade him to pay the costs in coupons, were repugnant to the Constitution of the United States.

Judgment was entered in this second action against Ellett, who obtained a writ of error from the Supreme Court of Appeals of Virginia, where the same was affirmed, and the case was then brought here by writ of error.

The act of March 30, 1871, under which the coupons tendered were issued, provides that they shall be receivable for "ALL taxes, debts, dues and demands due the State." The Supreme Court of Appeals of Virginia, in construing these words, held, in *Clarke* vs. *Tyler*, 30 Gratt., 134, that they included every possible demand that the State could make. The case involved the question whether a fine could be paid with coupons, and the court held that it could. Christian, J., delivering the opinion of the court, said, p. 138, *et seq.:*

"Now, the words used in the act we are called upon to construe are as broad, explicit, and comprehensive as any terms which could possibly be used. The act declares that coupons shall be receivable at and after maturity for ALL TAXES, DEBTS, AND DEMANDS DUE THE STATE. Is there any uncertainty or ambiguity in these terms? They all have a certain, definite, explicit, and technical meaning. We cannot discard any one of them as unmeaning and surplusage, but must, according to the rules of construction which bind the courts, *give effect to all.* We must suppose the Legislature knew the ordinary meaning and legal force of the words which they used. If the provision of the act had been that these coupons should be receivable '*for all taxes and debts due the State*,' there might be some room for doubt whether *fines* were embraced; for although fines are recoverable by action of debt, and in a certain sense a fine is a debt due the State, yet it might be said with much force, if not conclusively, that the word debt refers to matters of contract, and that therefore a fine is not embraced in the meaning of the statute in the word debt. But the words dues and demands are added. Shall we give no effect to these words of explicit meaning? Can we take the liberty of striking these words out of the statute? If we can, then the courts may override the powers of the Legislature and construe away any act it may pass. These words—dues and demands—are not uncertain and ambiguous, but have a certain, definite, and explicit meaning. The word due is defined by Webster to be 'that which is owed,' 'that which custom, statute, or law requires to be paid'; and by Worcester, 'that which any one has a right to demand, claim, or possess,' 'that which can justly be required.' The word 'demand' is a word of still larger significance and more comprehensive meaning. Indeed, Lord Coke says, the word demand is the largest word in law except claim. In 2 Coke upon Littleton, 291 b, he says '*demandum* is a word of art, and in the understanding of the common law is of so large an extent as no other word in the law is, unless it be *clamum*, whereof Littleton maketh mention, §445.' Webster defines 'demand,' 'the asking or seeking what is due or claimed to be due'; and Worcester, 'a calling for a thing due or claimed to be due.' No words of more explicit or broader signification could have been used than these two words '*dues and demands*.' We cannot discard them, but must give them effect."

The first judgment against Ellett is at page 6 of the record. It reads as follows:

"Therefore, it is considered by the court that the Commonwealth recover against the defendant the amount, interest and penalty, ascertained by the jury in their verdict aforesaid, with interest on the aggregate amount thereof from this day till payment, and the costs of this proceeding."

The execution, which is at page 8, follows the language of the judgment.

It would seem absurd to say, when a judgment reads, "that the Commonwealth recover against the defendant the amount, interest and penalty, ascertained by the jury by their verdict aforesaid, with interest on the aggregate amount thereof from this day till payment, *and the costs of this proceeding*"; and the execution commands the sheriff to make, out of the goods and chattels of the defendant, the principal, interest and penalty, "which the Commonwealth of Virginia, late in our Circuit Court of the city of Richmond, has recovered, as well for certain taxes for the year 1886 as interest thereon, and the penalty also, $16.40, which in the same court were adjudged for the costs of this cause"—I say it seems absurd, after this, to say that the Commonwealth is making no *demand* on the defendant for those costs.

The suit was a suit in the name of the State of Virginia, and for her benefit, and whatever costs were recovered were her costs, to be used in any way that suited her.

## ARGUMENT.

The first error assigned is the refusal of the court to receive the special plea offered. That plea averred as matter of fact that the sheriff had refused to receive the coupons in payment of the execution, because the act of May 12th forbade him to receive them, and that that act, in so forbidding him, was repugnant to the Constitution of the United States. The act commands the sheriff, if coupons are tendered him in payment of the execution, that he shall make return of that fact on the execution, that there may be another suit. This is the same thing as to command him to refuse the coupons. The court should have received the plea and enquired whether the averment was true, and, if true, should have ruled that the commands of an act repugnant to the Constitution of the United States could not justify the officer in refusing the coupons, and therefore that the plea offered a good defence to the action. But the order of court refusing the plea (top of page

5) states that the Judge gave his reasons for refusing the plea and made them part of the record. They are at page 10. The reason given by him is, that the costs of the former action were tendered in coupons, while the act of May 12th, section 16, of chapter 181, Code 1873, and section 27, chapter 180, Code of 1873, all taken together, appropriate these costs to the officers themselves, and therefore that they are not dues to the State. This ruling was affirmed by the Supreme Court of Appeals (p. 11). Here, then, is a ruling that the State's statutes forbid payment of these costs in coupons, and if the State had contracted that they should be paid in coupons, it was giving effect to a statute that impaired the obligations of that contract, in face of the defendant's claim that that statute, or those statutes, were repugnant to the Constitution of the United States, as the order refusing the plea shows (top of page 5).

The second error assigned is the refusal of the court to allow the defendant to prove that he had offered to pay the execution with the State's over-due tax-receivable coupons, as set out in the second bill of exceptions (p. 8). This bill states that the court refused to allow the proof for the reasons that have been already discussed, and the argument that has been made applies, of course, as much here as it did to the plea. It is that the State had contracted to receive the costs in coupons, and that the court gave effect to acts that forbade their reception for costs.

If it should be argued that we have here a decision by the highest court of the State that the contract does not include costs of an action, I reply that this court will not receive the decision of the State's court to prove what the effect of the contract is. It decides that point for itself.—*Jefferson Branch Bank* vs. *Skelley*, 1 Black, 436; *University* vs. *People*, 99 U. S., 309; 4 Wall., 177; 14 Wall., 661; 101 U. S. R., 794.

It would seem absurd to say that where a judgment is given for the State in a suit in which she is plaintiff, for costs, that those costs are not hers, but her officer's. She recovers them, and then chooses to dispose of them by giving them to her officers. But they have no vested interest in them. After recovery she might cover them into her treasury if she chose, and effectually deprive her officers of them, without any compensation at all; or she might put them into her treasury and cempensate them in some other way. Indeed, no better illustration of this could be needed than the very statutes cited by the court to show that the costs belong to the officers. Section 16 of chapter 181, Code of 1873, reads as follows:

"In a case wherein there is judgment or decree on behalf of the Commonwealth for costs, there shall be taxed in the costs the charge actually incurred to give any notice, although it be more than fifty cents; and the fees of attorneys and other officers for services and allowances for attendance, as if such fees and allowances were payable. What is so taxed for fees of or allowance to any person shall be paid to him by the sheriff or officer who may receive said costs, unless such person shall previously have received payment thereof, *in which case the same shall be paid into the treasury*."

Here is a clear announcement that the Commonwealth considers herself liable to her officers for the services performed by them, but proposes to collect the same from the losing litigant.

The substance of the matter, then, is that this court, construing the State's contract for itself, will hold that it is a contract to receive payment of the costs in coupons. It is then confronted with the fact that the Circuit Court of the city of Richmond has held that the three acts of Assembly, taken together, forbid payment of costs in coupons, and this ruling has been affirmed by the highest court in the State. The State courts are thus enforcing statutes which impair the obligation of the contract.

Since the case under review was decided by the Supreme Court of Appeals of Virginia, the United States Circuit Judge for that district, Hon. H. L. Bond, has had this question before him, and he has decided that costs are payable in coupons. His opinion is added, as follows:

*In the Matter of Marion Mitchell*—Before the Judge of the Circuit Court of the United States for the Eastern District of Virginia, on *habeas corpus.*

The petition for this writ alleges that Marion Mitchell is illegally confined by the authorities of the State of Virginia, and in violation of the Constitution of the United States, forbidding a State to pass any law to impair the obligation of a contract. The petition shows that he was convicted of a misdemeanor on the 18th of July, 1889, in the Hustings Court of the city of Manchester, and by that court was fined the sum of fifty dollars, and nineteen dollars and twenty cents costs, which he was adjudged to pay, or stand committed until the said fine and costs were paid. And that at a subsequent time, in the same court, he was fined twenty dollars after conviction for a similar offence, and thirteen dollars and twenty cents costs, which he was likewise adjudged to pay, or stand committed until he did so.

The petition alleges that after his said conviction, and the imposition of the said fines and costs, he tendered the amount of the same in genuine coupons cut from the bonds of the State of Virginia, which by law were made receivable for all debts, taxes, dues, and demands of the State of Virginia; but that the officers of the State refused to receive them in payment of said fines and costs, and he was committed to jail, where he now illegally languishes.

The return to the writ made by H. Fitzgerald, the sergeant of the city of Manchester, shows that he holds the petitioner in custody by virtue of the two writs of *capias pro fine* in favor of the Commonwealth of Virginia, which are in these words:

"The Commonwealth of Virginia—

"*To the Sergeant of the City of Manchester, Greeting:*

"We command you that you do not omit for any liberty in your bailiwick, but that you take Marion Mitchell, if he be found within the same, and him safely keep until he satisfy us fifty dollars, which we lately, in our Corporation or Hustings Court for the city of Manchester, recovered against the said Marion Mitchell for a fine assessed on him on conviction of a misdemeanor against our peace and dignity; also nineteen dollars and twenty cents, which to us in the same court were adjudged for our costs in that behalf expended, whereof the said Marion Mitchell is convict, as appears to us of record, and have this writ," &c., in the usual form.

The other *capias* is a counterpart of the one recited, except that the amount of fine and costs is less. The return admits the tender of coupons for the fine and costs, and states that the sergeant was willing to receive them in payment of the fines imposed, but refused to receive them for the costs, because such costs belonged not to the State of Virginia, but to the officers of the Hustings or Corporation Court of Manchester.

The question then, is, whether the coupons in question are receivable as well for the costs as the fines imposed by the Hustings Court.

The Court of Appeals of Virginia has decided that such coupons are receivable for all fines due the State, and we are under no necessity to determine whether or not a fine imposed for a misdemeanor is a public due or demand.

The *capias* which we have quoted sets out in plain words that the costs were adjudged to *us*, for *our* costs in that behalf expended.

If any other body or person has recovered anything against the defendant, Mitchell, it does not appear by the *capias*. It shows that what he is held in custody for is the demand, which the Court has allowed the Commonwealth to make for certain costs which the State has expended in punishing him for his offence against its peace and dignity. The claim of the Court's officers is not mentioned in the commitment.

Now, how the State may remunerate her officers for their services to her in this behalf is nothing to the purpose. When the party pays what is demanded of him, if he pay in coin, the State may allow its court officers to deduct the fees due them by statute and pay the balance into the State treasury, or she may require the whole amount to be paid into the treasury at once, and parcel out the statutory costs to her officers as she may by law provide.

But in no sense can it be claimed that there is any indebtedness on the part of Mitchell to these officers in their individual capacity for their work and labor in his behalf expended. The costs are a part of his punishment for disobeying the laws of the State. They are imposed by statutes, and the officers of the court claim them not in their individual capacity or name, but in the capacity as officers of the State and in her name, as the *capias* sets out.

If these costs be debts due the officers personally, they could sue Mitchell, the petitioner, for them, each in his own name. But after recovery he could not be imprisoned for nonpayment of the judgment, for the laws of Virginia forbid all imprisonment for debt, except under peculiar circumstances; and yet, here it is claimed he can, by virtue of this *capias*, be arrested, and a *capias ad satisfaciendum* issue, and he be imprisoned for a debt not due the State, but personally to its officers.

In my judgment the petitioner is entitled to his discharge, after surrendering to the sergeant the coupons heretofore tendered for his fines and costs.

HUGH L. BOND,
*Circuit Judge.*

July 29, 1889.

WM. L. ROYALL,
*for Plaintiff in Error.*

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JAMES H. McKENNEY,
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# Supreme Court of the United States.

## October Term, 1889.

H. W. ELLETT,
*Plaintiff in Error*,
vs.
THE STATE OF VIRGINIA.
No. 1058.

## BRIEF FOR PLAINTIFFS IN ERROR.

D. H. CHAMBERLAIN,
*Counsel for Plaintiffs in Error.*

# Supreme Court of the United States.

OCTOBER TERM, 1889.

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| H. W. Ellett,<br>Plaintiff in Error,<br>*vs.*<br>The State of Virginia. | No. 1,058. |

## Brief for Plaintiff in Error.

The record in this case shows that the plaintiff in error was proceeded against by the Commonwealth for a judgment for $64.49 in favor of the Commonwealth of Virginia, being the amount due on an execution issued against him on a judgment in favor of said Commonwealth, rendered in the Circuit Court of the City of Richmond, pursuant to the Act of May 12, 1887.

(*Record*, fol. 2).

The Act of May 12, 1887, appears at length in our brief in *McGahey* vs. *The State.*

The record further shows that upon the hearing of the motion for said judgment, the plaintiff in error offered a special plea in writing of tender; that the Commonwealth's attorney moved to reject the plea and the Court sustained the motion, and thereupon it was "considered by the Court that the Commonwealth recover against the defendant the sum of $64.49, with interest thereon from the second day of May, 1888, till paid, and costs of this motion, including a fee of ten dollars to her attorney for this motion."

(*Record*, fol. 3).

From the plaintiff in error's first bill of exceptions, it appears that in November, 1886, he was indebted to the State in the sum of $39.52, for taxes; that an action was brought against him by the Commonwealth for that sum and judgment was recovered for $39.52, with interest, penalty, and costs on same, amounting on the second day of May, 1888, to the sum of $24.49, all of which together with said sum of $39.52, originally due by said defendant, amounted in the aggregate to the sum of $64.49.

(*Record*, fols. 3, 4).

Thereupon, execution was issued on said judgment directing the sheriff "of the goods, and chattels, and real estate" of the plaintiff in error, to "cause to be made $39.52, with interest thereon to be computed at the rate of six per centum per annum from the 15th day of December, 1886, to the 25th day of March, 1888, until paid, and five per centum penalty thereon, which the Commonwealth of Virginia, late in our Circuit Court of the City of Richmond, has recovered as well for certain taxes for the year 1886, as interest thereon, and the penalty, also $16.40, which in the same court were adjudged for the costs of this cause."

(*Record*, fol. 4).

That on May 2, 1888, the plaintiff in error tendered to the sheriff in payment of said execution, tax-receivable coupons together with a small balance of lawful money, the sum tendered amounting exactly to what was due upon said execution for tax, interest, commissions, penalty, and costs; that the sheriff refused to receive said tender because of the Act of Virginia of May 12, 1887, entitled "An Act to recover by motion, taxes, and debts due the Commonwealth," &c., which forbade him to receive them.

(*Record*, fol. 4).

That the sheriff thereupon made return that coupons had been tendered and refused, and that the present suit was then brought because said Act of May 12, 1887, required it; defendant has always been ready and willing to deliver said coupons and money in payment of said execution, and is still ready and willing and brings the same into Court, and is ready to deliver the same to the sheriff.

(*Record*, fol. 5).

This plea the Commonwealth moved to reject on the ground that plaintiff in error had tendered coupons for the costs allowed upon the former motion or suit, the State claiming that said coupons were not a valid tender, under the laws of the State, for such costs, and the Court sustained the motion and rejected the plea; and the defendant excepted.

(*Record*, fol. 5).

The motion to reject the plea is under the practice of Virginia equivalent to a demurrer to the plea.

The record further presents plaintiff in error's second bill of exceptions, showing the proceedings upon the first motion for judgment for $39.52, and the plea of tender to the plaintiff in error upon that motion, with a copy of the execution and return to the sheriff.

(*Record*, fols. 6–10).

Judgment having been rendered against plaintiff in error for the entire amount claimed for taxes, interest, penalty and costs, the plaintiff in error appealed to the Court of Appeals where judgment was rendered, affirming the judgment below.

(*Record*, fols. 12-16).

The precise terms of the judgment in the *first* suit or motion appears in the Record at fol. 7, as follows:

"Therefore, it is considered by the Court that the Commonwealth recover against the defendant the amount, interest and penalty ascertained by the jury in their verdict aforesaid, with interest on the aggregate amount thereof from this day till payment, and the costs of this proceeding."

The verdict of the jury was, "We find for the Commonwealth the sum of $\$39\frac{52}{100}$, with interest till paid, and the penalty of five per cent."

The judgment in the *second* suit or motion is found at fol. 3 of the Record, as follows:

"It is considered by the Court that the Commonwealth recover against the defendant the sum of $64.49, with interest thereon from the second day of May, 1888, till paid, and the costs of this motion, including a fee of $10 to her attorney for this motion."

The form of the execution upon each of the foregoing judgments is found at fols. 4 and 9 respectively. Each of these executions directs the collection from the plaintiff in error of the amounts named, "which the *Commonwealth of Virginia*, late in our Circuit Court of the city of Richmond, has recovered."

The notice of motion for judgment in each case states that the motion is made for judgment in favor of the

"*Commonwealth of Virginia*," for the amounts named respectively; upon the first motion, for the sum of $39.52, with interest, "also for damages and costs"; and upon the second motion, for $64.49, "the amount due on an execution in favor of said Commonwealth," &c.

The opinions both of the trial Court and of the Court of Appeals (*Record*, fols. 11-16), show that the sole ground upon which the plea of the plaintiff in error was rejected, was that the costs in this case were not under the Act of May 12, 1887, and other acts, "debts, dues and demands" due the State, but were "the private property of the officers entitled to the fees assessed in the costs."

The plea tendered by the plaintiff in error upon the *second* motion for judgment, averred that the Sheriff refused to receive the tender of tax-receivable coupons in payment of the execution, "because the act of the General Assembly of said State, approved May 12, 1887, entitled, &c., &c., forbade him to receive them; that the said Sheriff has made the following returns to said execution, as said act requires, to wit:

"Coupons tendered as follows: Two thirty-dollar and one three-dollar coupon, and one $\frac{49}{100}$ dollars in money, which tender is refused."

"That he made this return because said act required it; that this second suit is brought because said act required it, and said act is repugnant to section ten of article one of the Constitution," &c. (*Record*, fols. 4, 5.)

The provisions of the Act of May 12, 1887, which are here referred to, are as follows:

"9. Should coupons be tendered the officer in satisfaction of said execution, *he shall note the fact of such* *tender upon the execution, and return it to the Clerk's office;* and thereupon the auditor of public accounts may *direct* an action to be brought upon the judgment. This action shall be instituted and prosecuted in the mode prescribed for actions to recover judgments for taxes, and similar actions may be instituted whenever coupons are tendered in satisfaction of any judgment obtained by the Commonwealth under the provisions of this act."

The Court refused the plea on grounds stated by the Court itself, at folios 11 and 12 of the record. They are, that the tender was not good for the entire amount of the execution, because the Act of May 12, 1887, and certain other provisions of the Code of Virginia of 1873 make the costs which form part of the amount named in the execution, the private property of the officers of the State.

The rulings of the Trial Court were affirmed by the Court of Appeals (*Record*, fols. 14, 15).

The record, therefore, presents a case in which it has been decided against the claim of the plaintiff in error, that certain State *statutes* exclude coupons as a valid tender for costs included in a judgment obtained under the Act of May 12, 1887.

In other words, the claim is (1), that the contract expressed by the Act of March 30, 1871, under which the coupons were issued, makes the coupons a valid tender for costs in such a case as the present; and (2) that subsequent statutes, including the Act of May 12, 1887, have been construed to forbid the payment of such costs in money, and require a tender thereof to be refused by the officer enforcing the judgment by execution, and not to be repugnant to the Constitution.

A Federal question being thus presented, namely: Does an act of the State of Virginia, which forbids its officers to receive a tender of coupons in payment of costs, violate the obligation of the coupon contract—it becomes necessary to examine and construe the contract set up, and compare it with the act which is drawn in question, as impairing its obligation.

The Act of March 30, 1871, under which the bonds and tax-receivable coupons in question were issued, provides that they shall be receivable for "all taxes, debts, dues, and demands due the State."

The meaning and extent of the terms of the Act of March 30, 1871, "all taxes, debts, dues and demands due to the State" have been considered by the Court of Appeals of Virginia, particularly in *Clark* vs. *Tyler* (30 Gratt., 134).

In that case coupons had been tendered for a criminal fine and had been refused by the officer having authority to enforce the fine. In an elaborate opinion, the Court of Appeals considers the scope of the words "debts, dues and demands due the State." The Court say, that if the words had been "taxes and debts" only, it might have been open to doubt whether *fines* were included, but that the added words, "dues and demands due the State" certainly cover every claim by the State of anything that is due her.

Still the specific question remains, does this cover costs in the present case ?

It will have been observed in our statement of the record (1), that the original motion for judgment (fol. 6), is "for a judgment *in favor of the Commonwealth against you;*" (2) that the judgment rendered (fol. 7) is "that *the Commonwealth recover* against the defendant, the amount, &c., and the *costs of this proceeding*"; (3), that the execution thereon (fol. 9) commands the making " of the goods ", &c., of the defendant, the amount of the taxes ($39.52), " which *the Commonwealth of Virginia has recovered*," " also sixteen dollars and fifty cents, which in the same Court were adjudged for the costs of this cause" ; and (4), that the second motion for judgment, the judgment thereon and the execution following, are all expressed in like terms.

How, now, can it be plausibly argued that this judgment and execution, demanded by the Commonwealth *in her own name alone*, giving to her *by her name alone* the amount named, and directing the Sheriff to make the amount which *the Commonwealth alone* has thus recovered, it is not a demand of the Commonwealth but the private property of her officers ?

No motion or suit to recover anything of the defendant has been brought by any one except the State ; no judgment has been rendered in favor of any one but the State ; no one but the State has demanded anything from the defendant.

If the Commonwealth's attorney might have proceeded directly and in his own name to recover the fee allowed him,—as he plainly could not do, because his fee, it is provided by the act which gives it. " shall be taxed in the costs against the defendant "—he certainly has not proceeded against the defendant and he is, in no way or sense, making any claim upon him. The State alone is claiming the costs. The demand for them is the demand of the State ; and the fact that when the State has satisfied her demand againt the defendant, she has declared by her statute that she will pay $10 as a fee to her attorney, is utterly immaterial and beside the question.

The statute does not create an indebtedness of the defendant to the State's attorney ; it does not profess to do so ; it enacts that $10 shall be taxed in the costs of the suit of the State against the defendant : and this is manifestly for the purpose of collecting it to be paid over thereafter to the attorney.

That the State regards costs as absolutely her own, to be disposed of as she sees fit, is shown by the very act referred to by the trial Court (fol. 11), which provides that " what is so taxed for fees or allowances to any person shall be paid to him by the sheriff or officer who may recover said costs unless " &c., &c. The words which the Court here omits are " unless such person shall have previously received payment thereof, in which case the same shall be paid into the Treasury ".

If the costs are before collection, as the trial Court held in this case (fol. 11), " the private property of the officers who had earned them," or if, as the Court of Appeals says (fol. 15), they " were the property of the officers of the Court, *to which the State had and could have no valid claim*," how can the State turn them into her treasury, if they have already been otherwise paid to the officers? The Courts below say they are the private property of the officers, and if they are, the State has no control over them, and the whole matter rests between the defendant and the officers. If, therefore, the defendant pays them otherwise, the claim is extinguished, and the State had no possible right to put them nto her treasury.

It is plain, therefore, that the State by the terms of the very statute cited by the Court below, regards these costs *as her own*, to be dealt with in all respects as her sole property.

No one probably will deny that the State might give costs accruing or fixed by statute in *State* cases, directly to her officers and authorize such officers to collect them; but nothing like that is attempted here. The State makes the fee of her attorney, like the costs of her other officers, *part of the costs of her suit.* They are thus due to her alone, and not to anyone else.

If we look at the origin and nature of costs, we reach the same result.

Costs are in all cases an increase or increment given as damages or recompense to the winning party.

From the earliest time a judgment in favor of a party on his cause of action and for costs, has been regarded as a unit, one element arising out of the original obligation of the party, and the other element arising out of the putting his adversary to a suit to enforce that obligation, and the two together constituting one common or undivided sum given by the Court in its judgment.

Thus in some suits at common law the jury could assess the costs of the suit as part of the damages sued for and include this amount in their verdict.

10 Co., 115 (b).
Merrifield's Law of Attorneys, 411.
Gibb. Eq. R., 195
Tidd's Pr., 945.
Phillip's *vs.* Bacon, 9 East., 298.

In *Celluloid Manufacturing Co.* vs. *Chandler* (27 Fed. Rep., 9), it was held that Sections 823 and 824 U. S. Rev. Stats., which fixed the amount taxable as compensation for attorneys, &c., did not change the party in whose favor the allowance was made, or take the costs from the party to the suit and give them to the attorney. The Court cites *Clay* vs. *Moulton* (70 Me., 315), where it said, "the bill of costs primarily belongs to *the successful party.* It is included in his judgment. It is not the attorney's, though he has a lien upon it;" and *Cooly* vs. *Patterson* (52 Me., 472), where it was said: "In strictness, all the items included in the bill of costs *belong to the party.*"

When, therefore, the Act of Virginia of May 12th, 1887, required that a fee of $10 be taxed in the costs of the suit for the attorney, it was equivalent to adding that amount to the State's judgment, and requiring the payment of it when collected by the State to the attorney of the State.

To hold that this fee, being made a part of the taxable costs, is payable in the first instance to the State in coupons, is not to deprive the attorney or the other officers to any extent of the compensation due them. The State receives coupons equivalent to the payment of the amount which they represent of the debt of the State, and the State is then left to pay the costs due to her officers in such manner as she may determine. The officers cannot in such case be deprived of their fees and costs except by the direct refusal or neglect of the State to pay to them the amount for which she has collected the exact equivalent from the taxpayer.

In other words, the State here has chosen to make all fees due her officers a part of her own costs ; she has by this made them *a demand due the State*, and hence payable in coupons. How she will settle with her own officers for what she has promised them, is no concern of the taxpayer.

The special attention of the Court is asked to the opinion of the Circuit Judge of the Fourth Circuit on this precise question, which is printed in full at the end of Mr. Royall's brief in this case.

D. H. CHAMBERLAIN,
Counsel for Plaintiff in Error.

## IN THE

# Supreme Court of the United States.

JOSEPH BRYAN,
vs.
THE STATE OF VIRGINIA.
No. 1055.

JAMES P. COOPER
vs.
THE STATE OF VIRGINIA.
No. 1056.

JAMES McGAHEY
vs.
THE STATE OF VIRGINIA.
No. 1057.

In error to the Supreme Court of Appeals of Virginia.

BRIEF OF COUNSEL FOR DEFENDANT IN ERROR.

IN THE

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JOSEPH BRYAN,
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THE STATE OF VIRGINIA. } No. 1056.

JAMES McGAHEY
vs.
THE STATE OF VIRGINIA. } No. 1057.

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In error to the Supreme Court of Appeals of Virginia.

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BRIEF OF COUNSEL FOR DEFENDANT IN ERROR.

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## STATEMENT.

These cases involve the same questions. In each case the taxpayer tendered coupons in payment of his tax-bill due the State, and suits were subsequently instituted under the provisions of the act of the general assembly, approved May the 12th, 1887.

Upon the trial the taxpayers pleaded the tender of coupons and money in payment and offered to prove that the coupons were genuine by expert testimony, which was rejected, and they were required to produce the bonds from which the coupons were cut.

The case of McGahey *vs.* State, supra, presents all the questions involved. Upon the trial the taxpayer moved the court to quash the notice and dismiss the proceeding upon the ground that act of May 12, 1887, was repugnant to section 10 of article 1 of the constitution of the United States. This motion was overruled, and the commonwealth thereupon proved that the defendant was duly assessed with and owed the State $12 60, the tax for which he was sued. The defendant then proved that when the taxes became due and payable, and prior to the institution of the suit, he tendered in payment thereof to the proper officer, the twelve dollars in coupons and sixty cents in lawful money of the United States, filed with his plea of tender, which coupons on their face purported to have been originally attached to bonds issued by the State of Virginia under the act of the general assembly, approved March 30th, 1871, entitled "an act to provide for the payment and funding of the public debt," said coupons being then due and payable, and having upon their face "receivable at and after maturity in payment for all taxes, debts and demands due the State," which coupons and money the officer refused to receive. The coupons were then offered and admitted in evidence. The defendant further proved that he did not own the bonds from which the coupons were cut, and knew nothing whatever in respect to their ownership; that the coupons when purchased by him were already detached from the bonds; that he bought them in the open market as genuine coupons without any reason to doubt their genuineness. He also proved that the State had issued bonds to the amount of many millions of dollars, the coupons upon which were wholly printed from engraved plates and not signed manually, among which were $100 00 bearer bonds, from Nos. 1 to 7641. The four coupons tendered and introduced in evidence, purporting to have been cut from $100 00 bearer bonds, numbered respectively, 1048, 2899, 4213, and 5684. The defendant also introduced two reports made to the senate and house of delegates of Virginia by the second auditor in the year 1882, in which he stated that he had no knowledge of any spurious or forged bonds or coupons issued or purporting to have been issued under the funding acts of 1871 or 1879. The defendant then offered to prove by expert testimony that the coupons were genuine coupons of the State, but the court refused to admit the testimony and the defendant excepted, alleging that the act of January 21, 1886, entitled "an act to amend and re-enact section 39 of chapter 167 of the Code of 1873, in relation to rules, pleadings, and evidence," is repugnant to section 10, article 1 of the constitution of the United States, and to article XIV of the amendments thereto.

The commonwealth then demanded of the defendant the production of the bonds from which the coupons tendered purported to have been cut, with proof that the coupons were actually cut therefrom. The defendant moved the court to disallow the demand upon the ground that the act was repugnant to article 10, section 1 of the constitution of the United States, but the court overruled the motion and sustained the demand. The defendant then prayed the court to give the jury the following instruction:

> "The court instructs the jury that the production of the bonds from which the coupons in issue were cut, together with proof that the coupons were cut therefrom, is not necessary to establish the genuineness of the coupon; and the act of the general assembly of Virginia, approved January 26, 1886, entitled "an act to prescribe a rule of evidence in certain cases," (now part of section 412, Code of 1887), requiring such production and proof when demanded, is in conflict with and repugnant to section 10, article 1 of the constitution of the United States, and to article XIV of the amendments thereto, and is void."

But the court refused this instruction and instructed the jury that the said act, now section 412, Code of 1887, was valid, and that such production of bond and proof when demanded was necessary to establish the genuineness of the coupons; to both of which rulings of the court the defendant then and there excepted. The defendant further prayed the court to instruct the jury as follows:

> "If the jury believe from the evidence that the State of Virginia issued her bonds with tax-receivable interest coupons thereto attached, which coupons were made payable to bearer, and were printed from engraved plates and not signed manually by an officer of the State; and if they further believe that the defendant purchased the coupons filed with his plea of tender in the open market in good faith, as and for genuine coupons of said State, then they are instructed that the burden is upon the State to prove said coupons spurious, and the act of her general assembly, approved March 12, 1887, entitled "an act to provide for the recovery by motion of taxes and certain debts due the commonwealth, &c.," which attempts to place upon the defendant the burden of proving them genuine, is repugnant to section 10, article 1 of the constitution of the United States, and is void."

But the court refused also this instruction, and the jury thereupon found a verdict for $13 96, the amount of tax-bill with interest, upon which judgment was entered. A writ of error was obtained from the supreme court of appeals of Virginia, and upon the hearing the judgment of the circuit court of Alexandria was affirmed. The case is now here upon a writ of error to the judgment of the supreme court of appeals of Virginia.

The other cases involve the same questions, the case of Bryan *vs.* State, No. 1055, having originated in the circuit court of Henrico county, and the case of Cooper *vs.* State, No. 1056, having originated in the circuit court of the city of Richmond. The errors assigned involve:

1st. The constitutionality of the act of the general assembly of Virginia, approved May 12, 1887, entitled "an act to provide for the recovery by motion of taxes and certain debts due the commonwealth, for the payment of which papers purporting to be genuine coupons of the commonwealth have been tendered," chapter 185, Acts, extra session, 1887.

2d. The constitutionality of the act of the general assembly entitled "an act to amend and re-enact section 39 of chapter 167, Code of 1873, in relation to rules, pleadings, and evidence," approved January 21, 1886.

3d. The constitutionality of the act of the general assembly, approved January 26, 1886, entitled "an act to prescribe a rule of evidence in certain cases."

## ARGUMENT.

It is contended that the statute of May 12, 1887,* is unconstitu-

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* *AN ACT to provide for the recovery, by motion, of taxes and certain debts due the commonwealth, for the payment of which papers purpose purporting to be genuine coupons of the commonwealth have been tendered.*

Approved May 12, 1887.

1. Be it enacted by the general assembly of Virginia, That all taxes, including taxes on licenses, now due or which may hereafter become due to the commonwealth, in payment of which any paper or instrument purporting to be a coupon detached from a bond of this State shall have been or may hereafter be tendered and not accepted as payment and not otherwise paid, may be recovered in the circuit court having jurisdiction over the county or corporation in which said taxes shall have been assessed, or if the tender was made to the auditor of public accounts in payment of taxes which he is authorized by law to receive, the said taxes may be recovered in the circuit court of the city of Richmond.

2. The court shall have jurisdiction without regard to the amount of the taxes claimed and though the amount be less than twenty dollars.

3. The proceeding shall be by motion, in the name of the commonwealth, on

tional because it impairs the obligation of the contract. This obligation as held in Antoni *vs.* Greenhow, 107 U. S., 769, and in Poindexter *vs.* Greenhow, 114 U. S., 270, to be the right of the taxpayer to have his coupons received for taxes when tendered. But this

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ten days' notice, and shall be instituted and prosecuted by the attorney for the commonwealth or corporation in which the proceeding is, or if it be instituted by direction of the auditor of public accounts in the circuit court of the city of Richmond.

4. The notice may be served in any county or corporation in the State in the mode prescribed by the first section of chapter one hundred and sixty-four of the Code (edition of eighteen hundred and seventy-three), or it may be served on any agent of the defendant in the county or corporation in which the proceeding is, and the word 'agent,' as here used, shall include any person who shall have made the tender aforesaid on behalf of the defendant, or if there be no known agent of the defendant in the said county or corporation it may be served by the publishing the same one time in some newspaper printed in the county or city where the tax was assessed, or if there be no paper printed in such county or city, then in some newspaper published in some county or city nearest to the county or city where such tax was assessed.

5. The motion may be tried or heard by the court or jury as motions in other civil cases. If the defendant relies on the tender of coupons as payment of the taxes claimed, he shall plead the same specifically and in writing, and file with the plea the coupons averred therein to have been tendered, and the clerk shall carefully preserve them. Upon such plea filed the burden of proving the tender and the genuineness of the coupons shall be on the defendant. If the tender and the genuineness of the coupons be established, judgment shall be for the defendant on the plea of tender. In such case the clerk shall write the word 'proved,' and thereunder his name in his official character, across the face of the coupons, and transmit them, together with a certificate of the court that they have been proven in the case, to the auditor of public accounts, who shall deliver the coupons to the second auditor, receiving therefor the check of the second auditor upon the treasurer, which check he shall pay into the treasury to the credit of the proper tax account.

6. If the defendant fails in his defence and the taxes claimed are found to be due the State, any coupon filed by him with a plea of tender, (and not spurious) shall be returned to him, and there shall be judgment for the commonwealth for the aggregate amount of the taxes due and the interest thereon from the time they became due till the date of the judgment, with interest on the said aggregate amount from the date of the judgment until payment, and costs.

7. No antecedent lien of the commonwealth for the taxes for which any judgment is rendered shall be deemed to be merged in the judgment or otherwise impaired by the recovery of the same, but such lien shall continue in force notwithstanding the judgment.

8. Every such judgment shall be docketed, as prescribed by law in other cases, and the clerk shall issue execution thereon, directed to the sheriff of any county (or sergeant of any city), who shall account for the money collected thereon to the auditor of public accounts.

obligation to receive coupons extends only to genuine coupons which have been issued by the State. In the case In re Ayers, 123 U. S., 443, the court, Mr. Justice Mathews delivering the opinion, said:

"It seems to be supposed in argument that the right of taxpayers in Virginia, who have tendered tax-receivable coupons in payment of their taxes to the proper collecting officer, to be forever thereafter free from suit by the State to recover judgment for such taxes, rests

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9. Should coupons be tendered the officer in satisfaction of said execution, he shall note the fact of such tender upon the execution and return it to the clerk's office; and thereupon the auditor of public accounts may direct an action to be brought upon the judgment. This action shall be instituted and prosecuted in the mode herein prescribed for actions to recover judgments for taxes, and similar actions may be instituted whenever coupons are tendered in satisfaction of any judgment obtained by the commonwealth under the provisions of this act.

10. The clerk of the court in which any such judgment is rendered in behalf of the commonwealth shall, as soon as it is rendered, transmit a certified abstract thereof to the auditor of public accounts, who shall record the same in a book to be kept for that purpose.

11. Immediately after the passage of this act the county and city treasurers, and all other officers authorized by law to collect or receive money for taxes due the commonwealth, including the license taxes, shall report to the commonwealth's attorney of their respective counties and cities, and also to the auditor of public accounts, the names of all persons assessed or liable therein for taxes due the commonwealth who have heretofore tendered (otherwise than for identification and verification) coupons for such taxes, and which taxes remain unpaid, the amount of the taxes due, on what account, and when they become payable, and a description, as far as possible, of the coupons tendered, and when tendered; and they shall thereafter make like reports whenever and as soon as any such tender may be made. As soon as the auditor of public accounts shall receive such reports he shall credit the proper officer with the taxes named therein, for which coupons were tendered.

12. The attorneys for the commonwealth, and the attorney-general, when it is his duty under this act to represent the commonwealth in any case in the circuit court in the city of Richmond, upon such report being made to them, or whenever they are otherwise informed of any such tender having been made, shall forthwith institute and prosecute such proceedings as are hereinbefore required.

13. In any case instituted under the provisions of this act, in which there is a judgment for the commonwealth, a fee of ten dollars shall be allowed the attorney for the commonwealth, or the attorney-general, as the case may be, which fee and fees of the clerk and other officers for services rendered in the case, as well as such other costs as are allowed by law in other cases in which the commonwealth is a party, shall be taxed in the costs against the defendant. The commonwealth shall not be liable for any fees or costs in any proceedings under this act.

14. If any officer fail to perform any duty required of him by this act he shall be fined not less than one hundred dollars nor more than five hundred dollars.

15. This act shall be in force from its passage.

upon the proposition that such a tender is in law a payment of the taxes, so as to extinguish all claim for them on the part of the State. This proposition, indeed, is said to be justified by the authority of certain language in the opinion of this court in the case of Poindexter *vs.* Greenhow, 114 U. S., 270. In that case the effect of a tender in the payment of taxes upon the subsequent act of the collector in seizing the personal property of the taxpayer was considered and decided, but there is nothing in the opinion which countenances the idea that such a tender was a payment of the taxes, so as to extinguish all subsequent claim of the State therefor. Its effect was precisely defined in the following statement (page 299): "His tender, as we have already seen, was equivalent to payment, *so far as concerns the legality of all subsequent steps by the collector to enforce payment by distraint of his property.*" There is nothing in the opinion to indicate that the party making the tender was relieved from the operation of the rule of law, making it necessary to keep the tender good, or that a subsequent action at law for the recovery of the taxes would be unlawful, reserving of course in such a case, the admitted right of the defendant to plead the fact of his tender and bring it into court, in pursuance of the usual practice in such cases, as a defence."

It will thus be seen that the obligation of the contract does not exempt the taxpayer from the necessity of keeping his tender good. If he has tendered what the State ought to receive, he must plead the fact and prove it when put in issue. The question at issue is, has the State so altered the remedy as to destroy or impair the obligation of the contract, which, as above explained, is to have his genuine legal coupons received in payment of taxes?

It is very clear that a law which only alters the remedy but leaves the taxpayer one substantially equivalent, does not impair the obligation of the contract. Whilst it is true that generally all laws in force applicable to the case at the time and place of making a contract enter into and form a part of the contract itself. (Walker *vs.* Whitehead, 16 Wall., 314–17). This does not preclude legislation more or less affecting the contract. Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract, and although the new remedy be less convenient than the old. (Cooley's Const. Lim., 350–1). Chief Justice Waite, delivering the opinion in Antoni *vs.* Greenhow, 107 U. S., 769, said:

"But it is equally well settled that changes in the forms of action and modes of proceeding do not amount to an impairment of the obligations of a contract, if an adequate and efficacious remedy is left. This limitation upon the prohibatory clause of the constitution in respect to the legislative power of the States over the obligation of contracts was suggested by Chief Justice Marshall in Sturges *vs.* Crowinshield, 4 Wheat., 122, and has been uniformly acted on since. (Mason *vs.* Haile, 12 Wheat., 370; Brownson *vs.* Kinzie, 1 How., 311; Von Hoffman *vs.* City of Quincy, 4 Wall., 535; Dreham *vs.* Stifle, 8 Id., 595; Gunn *vs.* Barry, 15 Id., 611; Walker *vs.* Whitehead, 16 Id., 314; Terry *vs.* Anderson, 94 U. S., 628; Tennessee *vs.* Snead, 96 Id., 69; Louisiana *vs.* Pilsbury, 105 Id., 278.) As was very properly said by Mr. Justice Swayne in Von Hoffman *vs.* City of Quincy, ubi supra, "It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the constitution, and to that extent, void," page 553. In all such cases the question becomes, therefore, one of reasonableness, and of that the legislature is primarily the judge. (Jackson *vs.* Lamphire, 3 Pet., 280; Terry *vs.* Anderson, ubi supra.) We ought never to overrule the decision of the legislative department of the government, unless a palpable error has been committed. If a state of facts could exist that would justify the change in a remedy which has been made, we must presume it did exist, and that the law was passed on that account. (Munn *vs.* Illinois, 94 U. S., 113.) We have nothing to do with the motives of the legislature, if what they do is within the scope of their powers under the constitution."

What remedy had the taxpayer before the passage of the act under examination? The State could summarily levy upon his property for the taxes when he was driven to an action of trespass. This court had decided that any levy by an officer after tender of genuine coupons and not accepted was illegal and made the officer a trespasser. The officer became a trespasser if he levied, and was liable to the State if he accepted, coupons which turned out to be spurious, against which she had a clear right to protect herself. These treasurers in the country were not experts, and she might well distrust their judgment in receiving all which were tendered. And when tendered and refused the taxpayer retained the coupons and brought trespass in the circuit court of the United States and recovered back in damages the tax paid by the levy. The State paying these judgments for her officers was without tax paid either in money or coupons; and the right of the State to these coupons so tendered and taken back had been denied and none had ever been delivered by such taxpayers. It is obvious that in this state of thing the same coupon might serve as a tender for many taxpayers in fraud of the rights of the State to have her taxes paid in money or in these coupons. To avoid all this—to compel the taxpayer to pay in coupons what he refused to pay in money, to verify the genuineness of the coupons tendered, and to forbear the ex parte procedure by levy—the statute of May 12, 1887, was passed.

On its face, in its preamble, in the procedure provided, there is no taint of unconstitutionality, according to the rulings of this court. 1st. It cannot be held to be unconstitutional for a State to provide for suits by itself, in its own courts, against citizens who have not paid their taxes, and a trial by jury to test the claim. In Maury *vs.* Hoboken, 18 How., 272, this court decided that a summary proceeding against collectors was "due process of law," against the contention that those famous words required trial by jury on a deprivation of property, but no one was heard to deny that if judicial procedure and jury trial were secured there could be any constitutional objection. "It is competent for the United States to sue any of its debtors in a court of law," per Curtis, J., page 283. To deny this competency would be to take from a sovereign what is the privilege of its poorest citizen. It is an essential function of every government; it cannot be denied to a State. If it can levy without judgment it must be competent to sue in order to obtain judgment. If it can seize the property of a citizen without hearing, it must have right to give him a hearing before seizure. (See Collector *vs.* Daly, 11 Wall., 113; Antoni *vs.* Greenhow, 107 U. S., 769.) 2d. There is not one clause in said act which denies the right of tender of genuine coupons but everything to conserve it. The three things the State aims at are to test the bona fides of the tender by requiring defendant, with his plea, to produce them and hand them over for the cancelling officer of the government; to require proof of genuineness of the papers tendered, and, in default of all of this, to get judgment for unpaid taxes.

The preamble speaks of the tender of papers purporting to be genuine coupons; the first and fifth sections do the same. The eleventh section speaks of a tender otherwise than for identification and verification. This shows a purpose to guard itself against spurious coupons. To test the bona fides of tender the fifth section provides for their production and proof of tender. *Prist et tout prist.* It is what Waite, C. J., means in Antoni *vs.* Greenhow, 107 U. S., 774, when he speaks of the tender being "kept good"—that is, not merely offered, but kept for the State bona fide as the tax due to it, and not as a shallow device to make ground for a suit in trespass if a levy be made, or to avoid paying taxes altogether. (See Bissell *vs.* Hayward, 96 U. S., 580). The tender of genuine coupons being proved, the act, section 5, declares judgment shall be for defendant on the plea of tender, and the claim is discharged. This gives the taxpayer his whole right. If he fails on his plea of tender, then judgment is rendered for the tax. In Antoni *vs.* Greenhow, supra, the court held the law of Virginia which required the delivery of the coupons for verification and the payment in money of the tax, and a suit by taxpayer against the State to get his money back, without costs on his success, to be constitutional. In this law he prepays no money, he keeps his coupons, he is put to no suit against the State to get his money back, but he stands on the defensive—is sued by the State, pleads his tender, and, if proved, pays no money and is discharged of taxes by the payment of them in these coupons. It is true, he recovers no costs, and neither does the United States or any other government allow them to a successful suitor. The United States requires prepayment of a tax claimed to be illegal and compels the taxpayers to sue to recover it back.

Indeed the constitutionality of the act was directly passed upon by this court in the case of In re Ayers, 123 U. S., 494, where Mr. Justice Mathews delivering the opinion of the court, answering the arguments advanced as to its repugnancy to the constitution of the United States, said:

"It is immaterial, in our opinion, to consider the matters which are alleged in respect to the course and conduct of such a suit after its institution, by reason of the provisions contained in other acts of the general assembly of the State restricting the mode of proof of the genuineness of the coupons tendered. What is required by the act of May 12, 1887, is that "if the defendant relies on a tender of coupons as a payment of the taxes claimed, he shall plead the same specifically and in writing, and file with the plea the coupons averred therein to have been tendered, and the clerk shall carefully preserve them. Upon such plea filed, the burden of proving the tender and the genuineness of the coupons shall be on the defendant. If the tender and the genuineness of the coupons be established, judgment shall be for defendant on the plea of tender. In such case the clerk shall write the word "proved" and thereunder his name in his official character across the face of the coupons, and transmit them, together with a certificate of the court that they have been proven in the case, to the auditor of public accounts, who shall deliver the coupons to the second auditor, receiving therefor the check of the second auditor upon the treasurer, which check he shall pay into the treasury to the credit of the proper tax account."

If a suit may be rightfully brought at all by the State to recover a judgment for taxes, in such a case, certainly, there is nothing in these provisions that violates any legal or contract rights of the party sued. If he defends the action on the ground of a lawful tender of payment, he must, of course, plead the tender, and may rightfully be required to bring into court the tender alleged to have been made. Under the issue upon this plea the burden is upon the defendant of proving the truth of its allegations. What shall be the amount and kind of proof necessary to establish the defense involves questions of law which can only be raised and decided in the course of the trial. Their determination is for the court where the trial is to be had. If, in pursuance of other acts of the general assembly, the contract rights of the defendant, as a taxpayer having tendered tax-receivable coupons, are denied to him in that trial, by reason of requirements in regard to the nature and quantity of proof as to the genuineness of the coupons, the errors of law thus committed can only be remedied, according to the common course of judicial proceedings, by a writ of error, which, as it would present a federal question, might ultimately be sued out in this court. But it is not to be assumed in advance, either, that such questions will arise or that, if they arise, they will be erroneously decided."

## THE ACT FORBIDDING EXPERT EVIDENCE.

The next question arises under the act of January 21st, 1886, which is as follows:

> " Where a bill, declaration, petition, or other pleading, alleges that any person made, endorsed, assigned or accepted any writing, no proof of the handwriting of such person, shall be required, unless the fact be denied by affidavit, with the answer, plea or other pleading which puts it in issue: provided, that no such affidavit shall be required where the signature of the maker, endorser, assignor, or acceptor of any paper is not in the personal handwriting of the party to be charged, or his agent, but was made by machinery, or in other manner than by the actual or personal handwriting of the party to be charged, or his agent; then in all such cases the burden of proving such paper to be genuine shall be upon the party relying upon the paper so offered to be read in evidence; and it is further provided, that expert evidence shall not be received to prove the genuineness of any paper or instrument made by machinery, or in any other manner than by the actual or personal handwriting of the party charged, or his agent."

The provisions of the above act, placing the burden of proving the paper to be genuine, and forbidding expert evidence to prove the genuineness of papers made by machinery, are complained of here.

The right to have one's controversies determined by existing rules of evidence is not a vested right. These rules pertain to the remedies which the State provides for its citizens; and generally, in legal contemplation, they neither enter into and constitute a part of any contract nor can be regarded as being of the essence of any right which a party may seek to enforce.

Like other rules affecting the remedy, they are subject at all times to modification and control by the legislature. These changes may lawfully be made applicable to existing causes of action. The whole subject is under the control of the legislature, which may prescribe such rules for the trial and determination, as well of existing as of future rights, as in its judgment will most completely subserve the ends of justice. As to what shall be evidence, and which party shall assume the burden of proof in civil cases, the authority of the legislature is practically unrestricted so long as its regulations are impartial and uniform.

Whilst this is true, it is conceded that the legislature has no power to establish rules, which, under the pretense of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights. (Cooley's Con. Lim., 457–8; Ogden *vs.* Saunders, 12 Wheat., 249; Webb *vs.* Den, 17 How., 577; Delaplaine *vs.* Cook, 7 Wis., 54; Kendall *vs.* Kingston, 5 Mass., 534; Himmelman *vs.* Carpentier, 47 Cal., 42; Rich *vs.* Flanders, 39 N. H. 323).

Tested by these principles, is the act under examination unconstitutional? Whatever may be alleged to the contrary, it clearly appears from the act that it prescribes a *general* rule of evidence, applicable alike to all cases investigated in the courts of the State, without reference as to who are the parties or what the subject matter of the controversy is. In applying it to the coupons of the State we must bear in mind that the coupons attached to bonds are not signed manually, but printed from engraved plates, capable of indefinitely multiplying the issue. The bonds are signed by the proper officer of the State, and are easily susceptible of proof as to their genuineness; but the coupons are not signed. Every coupon must, therefore, be the same, whether clipped from a bond which has actually been signed and issued, or from one which has not been signed or issued. It is manifest, therefore, that no expert testimony should be admitted in the trial of an issue as to the genuineness of a coupon, for the reason that it is impossible for him to say, in any given case, that the bond from which the coupon was clipped was ever executed and issued. The production of the bond, therefore, becomes necessary, not only as the best, but as the only positive evidence that the coupon is a genuine one. The common law rule universally recognized, is that the best evidence which the nature of the case is susceptible of shall be adduced. The statute is only declaratory of this rule. This statute was under examination in a previous case by the supreme court of appeals of Virginia. (Commonwealth *vs.* Weller & Sons, 82 Va., 623.) Lacy, J., in delivering the opinion of the court forcibly emphasizes the above principle:

"The Constitution of this State vests the legislative power of this Commonwealth in the General Assembly." The act of assembly in question was an act to prescribe a rule of evidence in the courts of the State. Section ten of the first article of the Constitution of the United States, provides among other things, that no State shall pass any law impairing the obligation of contracts; but this provision has no application whatever to rules of evidence or procedure in the State courts. The same provision is found in the fifth article, fourteenth section of the State Constitution.

"The act in question does not in any way affect the obligation of the contract, which is the foundation of the action. The rule prescribed is one which affects the mode of procedure only, and is in accordance with the principles of the common law. It is a fundamental principle of the common law. It is a fundamental principle that the best evidence is required, of which the case is susceptible, and it is one of the most important rules of evidence. Every disputed fact must be proven by the best obtainable evidence. It is a principle universally recognized by the courts. If the obligation of the State is admitted in the fullest sense as to all the bonds of the State, this admission admits no liability upon her for any but for her own bonds; and, when a dispute arises as to the genuineness of any alleged bond of the State, as an original proposition, the genuineness of the bond must be proved by competent testimony; for, if it is not a genuine bond, the State has no obligation concerning it. The bonds of the State are signed by her authorized public officer, the State treasurer. To these bonds, thus signed and duly executed, coupons are attached for the interest, which are not signed by any officer or authorized agent of the State, but are wholly printed or engraved. As long as the coupon is attached to the bond, the genuine signature of the bond, once established by competent testimony, as it may readily be, proves the coupon as well.

The coupon, once detached, becomes a printed or engraved slip; and although it may be genuine, and may have been cut from a signed bond—that is, a bond not only printed or engraved, *to be* duly executed by the State, *to be* signed by the treasurer, but a bond actually executed as the law required—when it is thus once detached, it does not bear the signature of any officer of the State written thereon, and may well be held difficult to be distinguished from a similar printed or engraved slip cut from an unexecuted bond. These bonds, with coupons attached, were originally printed or engraved, and sent to this State to be signed by the State treasurer. No action of the State, or officer of the State, was ever impressed upon the coupon, first or last. When cut from a bond which was executed duly as required by law, or when cut from a bond never really signed at all, they must therefore be exactly alike. The legislature of the State has declared that many spurious coupons are circulated, by which the State has been much embarrassed; and, in the judgment of the law-making power, it becoming necessary that the genuine coupons should be distinguished from the spurious coupons, the proceeding in this case was devised. The remedy thus provided should be unobjectionable to the real bondholders. It not only does not impair the obligation of their bonds, but completely and effectually sustains it. The genuine coupons are to be paid, or to be received for all debts or demands due the State. It is the spurious alone that are to be rejected.

"It may be inconvenient to a bondholder to present his bond when he seeks to realize on his coupon, but that argument is of no avail against a rule of evidence, established by the legislature to regulate the proceedings in the courts of this State."

Expert testimony cannot, therefore, in the very nature of the case, be the best evidence. The coupons, genuine and spurious, were exactly alike and undistinguishable when detached. One may be detached from a bond actually issued; another may be detached from a bond which has *not* been issued, and no expert could possibly determine which was genuine and which was not. It is argued that coupons, when detached from the bonds after maturity, are negotiable instruments, and there should be no obligation upon the holder to show them to be genuine. But this argument cannot avail against a rule of evidence. Concede that the coupons are negotiable and have all the attributes of negotiable instruments, yet they must be shown to be *genuine* whenever their validity is challenged.

The act is only declaratory of the common law which throws the burden of proof upon the coupon tenderer; but suppose that it does change the rule, this does not render it invalid. Cooley's Con. Lim., 368; Antoni *vs.* Greenhow, *supra*, and cases cited; Von Hoffman *vs.* City of Quincy, 4th Wall., 535.

All the argument advanced against the act arises more from inconvenience than from any deprivation of right. It is well known that thousands of dollars of coupons have been proven genuine by the production of the bonds, and that every coupon can be so identified if proper effort is made. It is not sufficient for a taxpayer to come and say that, with full knowledge of the existence of a statute forbidding expert testimony and requiring the production of the bond, that he *innocently* purchased the coupon. The bondholder, when he clips the coupon and offers it for sale, knows that if tendered for taxes, the bond must be produced to prove the coupon genuine. The purchaser is aware of the same statute; yet he takes no precaution, does not attempt to ascertain where the bond is held, or try to produce it in evidence, contenting himself with the declaration that he does not know and has no means of knowing where the bond is. Tested by any rule which may be applied, it clearly appears that the statute does not require an impossibility. The mode of proof is an easy one, and if the bondholder clips and sells the coupon to a person who does not take the precaution of stipulating for the production of the bond, it is his own lookout. For aught this court knows, the bonds are all held where they can be easily produced, and as a matter of fact, they are being produced in large amounts; but if not held where they can be easily or conveniently produced, they are held where they *can* be produced, and the argument of convenience will not prevail. The same mode of transmission is open to the bond which was open to the coupon.

Much stress is laid upon the refusal of the court to instruct the jury that the coupons were prima facie genuine, and that the act placing the burden of proof upon the defendant was unconstitutional. But how is this? The defendant is sued for taxes admittedly due, and he sets up as a defence that he has tendered the State her tax-receivable coupons, and produces in court printed papers, the validity of which are denied, and asks that the court shall say that his case is proved, and that he must go quit of any further demand because the State has issued bonds with tax-receivable coupons. Suppose the tax collector had levied for the bill and been sued in trespass for damages, would it not have been incumbent upon him to have shown that he had tendered genuine coupons? Unquestionably. Suppose A. makes a number of negotiable notes to divers parties, and he afterwards sues B. for a debt, can B. plead one of these notes as a set-off, and have the court instruct the jury that because it is shown that A. made a number of notes, that prima facia the one purporting to have been executed to B., must, in the absence of proof to the contrary, be taken as genuine and set-off against A.'s demand? Certainly not. B. must show by competent testimony that the note was duly executed.

At common law whenever a plea is adjudged good and issue joined upon it, the burden of proof lies with the party filing the plea. The reason is obvious; a point is arrived at when the court says your defence is good in law, if true in fact, and resort is had to a jury to determine the truth of the fact. The attempt is made to clothe the tender of coupons with the attributes of a tender of money, but this court has said that they are not money nor *bills* of credit; that they are simply interest obligations of the State, which she has contracted to receive in payment of taxes. All the argument therefore made as to what would be the effect of an attempt to discredit bank notes or other issue of money is without point or efficacy. It all comes back at last to the contention that the general assembly has altered the rules of evidence, and thrown the onus upon the defendant. Grant that the act is not declaratory of the common law, and the rule has been changed by the general assembly, in the absence of anything to the contrary, the court is bound to presume it had good reason for so doing. The change in the rule of evidence has not impaired the obligation of the contract; it remains the same, its validity remains unchallenged, with ample provision for compliance when established in accordance with a rule of evidence, which, although it may be more inconvenient, is sure and conclusive. 94 U. S., 469.

## THE PRODUCTION OF THE BONDS.

Much that has been said upon the question of the act forbidding expert evidence applies with equal force to the act requiring the production of the bond. The act is as follows:

"Be it enacted by the general assembly of Virginia, That in the trial of any issue involving the genuineness of a coupon, appearing or purporting to have been cut from any bond authorized by law to be issued by the State of Virginia, or by any city, county, or corporation, the defendant may demand the production of the bond; and thereupon it shall be the duty of the plaintiff to produce such bond, with proof that the coupon was actually cut therefrom."

The bonds are signed manually by the second auditor and treasurer of the State, and as before stated, are easily susceptible of proof. When produced, the certainty of the issue of the coupon is established, and by comparison of the coupons remaining upon the bond, an easy mode of identification is secured which is in strict compliance with the rules of the common law as interpreted by this court. "But the general rule of the common law, disallowing a comparison of handwriting as proof of signature, has exceptions equally as well settled as the rule itself. One of these exceptions is that if a paper admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some other purpose in the cause, the signature or paper in question may be compared with it by the jury." Moore *vs.* United States, 1 Otto., 270. See also Routs, Adm'r *vs.* Riles, Adm'r, 1 Leigh, 216; Burruss' case, 27 Gratt., 934; Hanriot *vs.* Sherwood, Va. Law J., 1884, p. 107, Ogden *vs.* Saunders, 12 Wheat., 350.

It is argued strenuously that the State, in issuing the bonds, contracted with the creditor that the taxpayer should not be required to produce the bond, and that the coupon might be proven by any other evidence which was available. When the funding act was passed, the rules of the common law were in force in Virginia, and one of its fundamental rules, as before stated, is, that the best evidence must be adduced. It is idle to say what the creditor supposed the State would do. The contract was made with reference to what she might lawfully do; and the fact that they did not consider the consequences which would result from exercise of the power reserved to require the production of the bond as the best evidence of its genuineness, and the consequent genuineness of the coupon clipped from it, does not affect the lawful exercise of that power.

It is useless to assert that expert testimony would be equal to the production of the bond, with proof that the coupon was cut from it. There the jury have an instrument which is beyond question—the bond signed by the proper officer—they have further the genuine coupon attached for comparison, and the proof that the coupon offered was clipped from that identical bond. It is an impossibility for any witness, no matter how expert he may be, to say, in a given instance, whether the coupon in question was clipped from a bond which had been issued, or not, so that his evidence would be weak, indeed, in comparison with the production of the bond, and the proof that the coupon had been cut from it.

In one of the numerous cases which have arisen out of this question, one of the witnesses, a practical engraver and printer, testified that if he had the right to do so, for $300 he could print $1,000,000 of the coupons which could not be distinguished from the genuine ones. Expert testimony, in the very nature of the case, is the best evidence which can be adduced to prove bank notes genuine, as there is no other more certain mode of proof. It is altogether different with the coupon. The coupon can be proven genuine beyond question without resort to the opinion of any one, as expert testimony is only the opinion of the witness. The fact that the bonds are being produced every day upon the trial of cases involving the genuineness of the coupon is conclusive that the State does not require an impossibility, but only prescribes a wholesome rule of evidence applicable generally to the trial of all similar cases arising in her courts.

R. A. AYERS,
*Attorney-General of Virginia.*

J. RANDOLPH TUCKER,
*For defendants in error.*

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# IN THE

# Supreme Court of the United States.

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H. W. ELLETT
vs.
THE STATE OF VIRGINIA, } No. 1058.

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In error to the Supreme Court of Appeals of Virginia.

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BRIEF OF R. A. AYRES, ATTORNEY-GENERAL OF VIRGINIA, AND J. RANDOLPH TUCKER FOR THE STATE OF VIRGINIA.

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## STATEMENT.

In this case the plaintiff in error owes the State of Virginia $39 52 for taxes upon which judgment was obtained in a suit brought in the circuit court of the city of Richmond, under the provisions of an act of the general assembly of Virginia, entitled an act to provide for the recovery, by motion, of taxes and certain debts, due the commonwealth, for the payment of which papers purporting to be genuine coupons of the commonwealth have been tendered, approved May 12th, 1887.

There was included in the judgment $16 40 due to the officers of the court for their fees. The plaintiff in error tendered to the sheriff coupons in payment of the judgment, principal, interest and costs, but the sheriff refused to receive them, because the amount taxed in the costs for fees of the officers were not "taxes, debts and demands" due the commonwealth, and were not solvable in coupons.

A second suit was thereupon instituted, and upon the trial the defendant offered a plea averring the tender of coupons in payment of the former judgment, including the costs, which plea was adjudged bad on demurrer, and judgment was entered against him for the amount of principal, interest and costs. Upon writ of error to the supreme court of appeals of Virginia, the judgment was affirmed, and the case is now here upon a writ of error to said court.

## ARGUMENT.

There is but one question involved here, so far as the record discloses, and that is, whether the costs taxed in the judgment for the officers of the court in a proceeding instituted and prosecuted under the act of May 12th, 1887, cited above, are debts or demands due the State. The section of the statute pursuant to which the costs are taxed, is as follows, viz: "In any case instituted under the provisions of this act in which there is a judgment for the commonwealth, a fee of ten dollars shall be allowed the attorney for the commonwealth, or the attorney-general, as the case may be, which fee and the fees of the clerk and other officers for services rendered in the case, as well as such other costs as are allowed by law in other cases in which the commonwealth is a party, shall be taxed in the costs against the defendant. The commonwealth shall not be liable for any fees or costs in any proceeding under this act." The execution issued upon the judgment following the requirements of the statute:

"The commonwealth of Virginia to the sheriff of the city of Richmond: We command you that of the goods, chattels and real estate of H. W. Ellett, in your bailiwick, you cause to be made thirty-nine dollars and fifty-two cents, with interest thereon, to be computed after the rate of six per centum per annum, from the 15th day of December, 1886, to the 20th day of March, 1888, and with interest on the aggregate amount from the 20th day of March, 1888, until paid, and five per cent. penalty thereon, which the commonwealth of Virginia late in our circuit court of the city of Richmond has recovered, as well for certain taxes for the year 1886 as interest thereon and the penalty; also sixteen dollars and forty cents, which in the same court were adjudged for the costs of this cause, whereof the said H. W. Ellett is convict, as appears to us of record."

It will be seen by reference to said section 13 that "the commonwealth shall not be liable for any fees or costs in any proceeding under this act." The commonwealth having no obligation concerning the fees, was in no way entitled to them. It is argued that section 16, chap. 181 of the Code of 1873, applies here. The section reads:

"In a case wherein there is judgment or decree on behalf of the commonwealth for costs, there shall be taxed in the costs the charge actually incurred to give any notice, although it be more than fifty cents; and the fees of attorneys and other officers for services and allowance for attendance, as if such fees and allowances were payable out of the treasury. What is so taxed for fees of, or allowance to any person shall be paid to him by the sheriff or officer who may receive said costs, unless such person shall previously have received payment thereof, *in which case the same shall be paid into the treasury.*"

This section cannot apply from the fact that the statute under which the fees are taxed, provided that the commonwealth shall not be liable for any fees or costs in any proceeding under the act. Now, it is impossible for the officer to have previously received payment, because there was no one to pay him. The fees are not payable by the State, and unless he succeeds in collecting from the defendant, he loses them. In no instance does the law require payment of fees into the treasury where there is no law allowing payment of fees out of the treasury. Wherever the statute allows fees and forbids their payment out of the treasury, the State has no interest in them whatever; they are taxed for the officer, collected for him and paid to him. If he does not succeed in collecting from the defendant, the State does not reimburse him. If he collects the fees, they are his, and in either event, the State has no interest or concern in them whatever. There is no federal question arising on this record or involved in the decision of this case. No statute of Virginia was passed upon. The validity of the coupon as a legal tender for all "taxes, debts and demands" due the State was not challenged or denied. The cases of Jefferson Branch Bank *vs.* Skelly, 1 Black, 436; University *vs.* People, 99 U. S., 309, do not sustain the argument advanced by plaintiff in error. These were cases which directly involved the validity of contracts arising under the constitution and statutes of the States which were subsequently invaded by State legislation. Here there is no such invasion. It is true the plaintiff in error in the bill of exceptions has the court to state that the plea was rejected "against his claims that the statute or statutes of the

State of Virginia, which forbid him to pay the costs of the former motion against him, in the State's over-due tax-receivable coupons, is or are repugnant to section ten of article one of the constitution of the United States," but no such statutes were involved or passed upon by the circuit court, for there are none such in existence. The court decided that the State had no interest whatever in the costs, and that they were not debts or demands due her. The decision did not involve the validity of any act of the general assembly of Virginia. The receivability of the State's coupons for all taxes, debts and demands against her was not questioned.

In the case of Jefferson Branch Bank *vs.* Skelly, supra, Mr. Justice Wayne delivering the opinion of the court, fully elucidates the ground of jurisdiction in such cases. "We answer to this as this court has repeatedly said, whenever an occasion has been presented for its expression, that its rule of interpretation has invariably been, that the constructions given by the courts of the States to State legislation, and to State constitutions, have been conclusive upon this court, with a single exception, and that is when it is called upon to interpret the contracts, "though they have been made in the forms of law," or by the instrumentality of a State's authorized functionaries in conformity with State legislation. It has never been denied, nor is it now, that the supreme court of the United States has an appellate power to revise the judgment of the supreme court of a State, whenever such a court *shall adjudge that not to be a contract* which has been alleged in the forms of legal proceedings by a litigant, to be one, within the meaning of that clause of the constitution of the United States which inhibits the State from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by by some particular State legislation, if this court could not decide, independently of all adjudication by the supreme court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the supreme court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this court should or could, with fidelity to the constitution of the United States, follow the construction of the supreme court of a State in such matter, when it entertained a different opinion; and in forming its judgment in such a case, it makes no difference in the obligation of this court in reversing the judgment of the supreme court of a State upon such a contract, whether it be one claimed to be such under the form of State legislation, or has been made by a covenant or agreement by the agents of a State, by its authority."

It will be seen that the jurisdiction is based directly upon the decision of contract rights growing out of a State statute subsequently sought to be overturned by legislative enactment. "The conflict of the State law with the constitution of the United States, and a decision by a State court in favor of its validity must appear on the face of the record before it can be re-examined in this court. It must appear in the pleadings of the suit, or from the evidence in the course of trial, in the instructions asked for, or from exceptions taken to the ruling of the court. It must be that such a question was necessarily involved in the decision, and that the State court could not have given a judgment without deciding it." Lawler *vs.* Walker, 14 Howard, 149.

The plaintiff in error cites an opinion of the judge of the circuit court of the Eastern District of Virginia as authority for his doctrine that the costs taxed in a judgment for the commonwealth may be paid in coupons. Granting, for the sake of argument, that the learned circuit judge decided the case properly, (which is denied), it will be seen by an examination of the execution set out by him that it differs materially from one in the case under examination. In that case the learned judge places much stress upon the fact that the capias issued for the fine set out, in plain words, that the costs were adjudged "*to us* for *our* costs in that behalf expended." When we examine the execution in this case we find that the language is altogether different. After reciting the recovery of the taxes, interest and penalty, it adds, "also sixteen dollars and forty cents which in the same court were adjudged for the costs of this cause." The distinction is plain and the reason obvious. In misdemeanor cases, the fees and costs of the officers of the court are payable by the commonwealth, out of the treasury, and as a rule, are paid before the judgment is collected; hence the provision in the statute cited by plaintiff in error. "What is so taxed for fees of, or allowances to any person shall be paid to him by the sheriff or officer who may receive said costs, *unless such person shall previously have received payment thereof*, in which case the same shall be paid into the treasury."

In the case they cite, the fees being payable out of the treasury.